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**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit.**

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SACRAMENTO VALLEY ELECTRIC RAIL-  
ROAD COMPANY, a Corporation,  
Plaintiff in Error,

VS.

TAGGART ASTON,  
Defendant in Error.

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**Transcript of Record.**

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Upon Writ of Error to the United States District Court  
of the Northern District of California,  
Second Division.

**Filed**

DEC 10 1915

**F. D. Monckton,**  
**Clerk.**





United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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*In the District Court of the United States for the  
Northern District of California.*

TAGGART ASTON,

Plaintiff,

vs.

SACRAMENTO VALLEY ELECTRIC RAIL-  
ROAD COMPANY, a Corporation,  
Defendant.

**Complaint.**

The plaintiff for a cause of action against the defendant complains and alleges;

1. That the plaintiff is an alien, was born in foreign parts, and is, and at all the times hereinafter mentioned was, and now is, a citizen of the Kingdom of Great Britain and a subject of the King of Great Britain; and is and was, at all the times hereinafter mentioned, a resident and inhabitant of the State of California, residing within the Northern District thereof, at Berkeley in the County of Alameda in said State.

2. That the defendant is, and at all the times hereinafter mentioned was, a corporation organized and existing under the laws of the State of California with its principal place of business at the City and County of San Francisco, State of California and was at all of said times and now is a citizen of the United States of America and a citizen and resident of said State of California and resident and inhabitant of said Northern Judicial District of California.

tract to the defendant and tendered also the services of the said Wilsey in the matter of the presentation of said report to said financial interests both in England and upon the continent of Europe, but that each and all of said tenders and offers to perform were by the defendant refused; that ever since the 1st day of October, 1913, the defendant herein has wholly failed, neglected and refused, and still wholly fails, neglects and refuses to perform upon its part the terms of the aforesaid contract between plaintiff and defendant to plaintiff's damage in the sum of Thirty-three Hundred Fifty and 00/100 (\$3,350.-00) Dollars.

And for a second and further cause of action against the defendant herein, plaintiff complains and alleges. [3]

1. That the plaintiff is an alien, was born in foreign parts, and is, and at all the times hereinafter mentioned was, and now is, a citizen of the Kingdom of Great Britain and a subject of the King of Great Britain; and is and was, at all the times hereinafter mentioned, a resident and inhabitant of the State of California, residing within the Northern District thereof, at Berkeley in the County of Alameda in said state.

2. That the defendant is, and at all the times hereinafter mentioned was, a corporation organized and existing under the laws of the State of California with its principal place of business at the City and County of San Francisco, State of California and was at all of said times and now is a citizen of the United States of America and a citizen and

resident of said State of California and resident and inhabitant of said Northern Judicial District of California.

3. That at all the times herein alleged, Taggart Aston was, and is now, a consulting civil engineer, engaged in the practice of his profession in the City and County of San Francisco and the State of California.

4. That between the 22d day of September, 1913, and the 23d day of January, 1914, the said Taggart Aston performed professional services as a civil engineer for the defendant at its special instance and request in gathering data and preparing reports showing the estimates of the cost of construction of the defendant's proposed railroad from Red Bluff to Dixon and the amount of the possible traffic hereof and the amount of the possible financial returns therefrom to be received by the defendant from the maintenance and operation of said railroad.

5. That said services were reasonably worth the sum of Three Thousand Five Hundred (3,500) Dollars; that said sum has not been paid nor any part thereof, except the sum of One Hundred Fifty (150) Dollars, and that there is now due and [4] owing from defendant to plaintiff on account of said services the sum of Three Thousand Three Hundred Fifty (3350) Dollars.

WHEREFORE, Plaintiff demands judgment in



the sum of \$3,350.00 and for his costs and disbursements of this action.

JACOB M. BLAKE,  
Attorney for Plaintiff.

JAMES L. CRITTENDEN,  
Of Counsel for Plaintiff. [5]

[Endorsed]: Filed May 6, 1914. [6]

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[Title of Court and Cause.]

**Answer.**

Now comes the defendant and answering the complaint on file herein, admits, avers and denies as follows:

1. That as to the allegation contained in paragraph 1, of the first cause of action, that "plaintiff is an alien, was born in foreign parts, and is, and at all the times hereinafter mentioned was, and now is, a citizen of the Kingdom of Great Britain and a subject of the King of Great Britain," defendant has no knowledge, information or belief sufficient to enable it to answer the said allegation, and therefore, and for that reason, and on that ground, denies that plaintiff is an alien, and is or was at all the times in the said complaint mentioned, or now is, a citizen of the Kingdom of Great Britain or a subject of the King of Great Britain.

2. Denies that on or about the 22d day of September, 1913, or at any other time, or at all, the defendant made or entered into a contract or agreement with the plaintiff wherein or whereby it employed plaintiff as a consulting civil engineer, or

otherwise, to gather data or prepare a report showing the estimates of the cost of construction of the defendant's proposed railroad project in California, and of the amount of the possible traffic and of the probable financial returns therefrom to be received [9] by the defendant from the maintenance and operation of its proposed railroad from Red Bluff investigation of its proposed route in the field, and to examine all traffic conditions and all financial to Dixon, in the State of California from an actual returns to be developed by the construction of defendant's proposed railroad in California as compared with the known earnings of other similar lines of railroad in the Sacramento Valley in said State; denies that the said defendant, on the said 22d day of September, 1913, or at any other time, or at all, made or entered into any contract of any kind or character with the said plaintiff, or any contract or agreement to make any report or gather any data upon any of the points or subjects referred to in said complaint, or on any other subject, or at all; denies that at the time of entering into said contract, or at any other time, or at all, it was understood or agreed upon the part of the plaintiff herein that he would cause the said report to be presented to financial interests abroad,—that is to say, to parties in England or upon the continent of Europe who deal in stocks and bonds of American railroad projects, by one W. J. Wilsey; denies that said plaintiff had any contract or agreement, or that it was understood or agreed that he was to prepare any report of any kind or character for defendant, or that he was to

present any report to any financial interests in England, or in any other place, by one W. J. Wilsey, or by any other person; denies that in or by the terms of said alleged contract of employment, or by the terms of any contract, or otherwise, or at all, the defendant promised or agreed to pay plaintiff for his services in furnishing any report, the sum of Three Thousand Five Hundred (\$3,500) Dollars, as follows, to wit: Seven Hundred Fifty (\$750) Dollars to be paid on September 27th, 1913; Seven Hundred Fifty (\$750) Dollars on or before October 13th, 1913; Five Hundred (\$500) Dollars on November 3d, 1913; Five Hundred (\$500) Dollars on November 17th, 1913, provided said [10] report was completed by that time, and if not, upon the completion thereof; denies that said defendant agreed or promised to pay plaintiff the sum of Three Thousand Five Hundred (\$3,500) Dollars, or any other sum; denies that said defendant agreed to pay the said plaintiff Seven Hundred Fifty (\$750) Dollars, or any other sum, on September 27th, 1913, or at any other time, or at all, denies that defendant agreed or promised to pay plaintiff Seven Hundred Fifty (\$750) Dollars, or any other sum, on or before October 13th, 1913, or at any other time, or at all, denies that said defendant agreed or promised to pay plaintiff the sum of Five Hundred (\$500) Dollars, or any other sum, on November 3d, 1913, or at any other time, or at all; denies that said defendant agreed or promised to pay plaintiff the sum of Five Hundred (\$500) Dollars, or any other sum, on November 17th, 1913, or at any other time, or at all;



denies that said defendant agreed or promised to pay the said plaintiff any sum whatever, whether said report referred to in said complaint was completed by November 17th, 1913, and if not upon the completion thereof; denies that said defendant employed the said plaintiff to prepare any report at any time, or at all, or agreed to pay him any sum whatever, at any time, or at all, for any report he might prepare; denies that the balance on said sum of Three Thousand, Five Hundred (\$3,500) Dollars, amounting to One Thousand (\$1,000) Dollars, or any other sum; was agreed to be paid when said defendant should hear from the said Wilsey from London that the matter of the presentation of said report was receiving favorable consideration; denies that said defendant agreed or promised to pay to said plaintiff the sum of One Thousand (\$1,000) Dollars as a balance on said alleged sum of Three Thousand Five Hundred (\$3,500) Dollars, or otherwise, or at all; denies that [11] there was any contract or agreement of any kind or character whereby said defendant agreed to pay said plaintiff said sum of One Thousand Dollars, or any other sum, under the terms or conditions alleged in the complaint, or any other terms or conditions denies that said defendant, at any time, or at all, made any agreement to pay said sum of Three Thousand, Five Hundred Dollars, or any part thereof, to the said plaintiff, as alleged in said complaint, or otherwise, or at all; denies that on the 23d day of September, 1913, or at any other time, plaintiff entered upon the performance of said contract, or any contract,

made with said defendant; denies that thereafter, and on or about the first day of October, 1913, or at any other time, or at all, or without fault on the part of the plaintiff, or while plaintiff was engaged in the performance of said contract, the defendant herein repudiated the said alleged contract with plaintiff, or any contract with plaintiff, or refused to proceed further in the performance of said contract on his part, as aforesaid, denies that said plaintiff had any contract with the said defendant; denies that the said defendant, by or through its president, one Charles L. Donohoe, referred to in the complaint as Charles L. Donohue, gave written or any notice to plaintiff to refrain from the preparation of said report; denies that prior to the alleged repudiation of the said contract by defendant, or at any other time, or at all, said defendant accepted the performance thereof on the part of plaintiff, as aforesaid; denies that said defendant paid plaintiff on account of said contract the sum of One Hundred and Fifty (\$150) Dollars, denies that said defendant has repudiated any contract with plaintiff, for the reason that said defendant has not at any time entered into any contract with plaintiff, denies that thereafter, at various times between said first day of October and the 23d day of January, 1914, or at [12] any other time, or at all, plaintiff offered to perform or tendered on his part the performance of said contract to the defendant or tendered also the services of said Wilsey in the matter of the presentation of said report to said financial interests, both in England and upon the continent of Europe; de-

denies that each or all of said tenders or offers to perform were by the defendant refused; denies that ever since the first day of October, 1913, or at any other time, or at all, the defendant herein has wholly or at all failed or neglected or refused, or still wholly or at all fails or neglects or refuses to perform upon its part the terms of any contract between plaintiff and defendant, to plaintiff's damage in the sum of Three Thousand, Three Hundred and Fifty (\$3,350) Dollars, or any other sum.

## II.

Answering the second cause of action in the said complaint alleged, defendant admits, avers and denies as follows:

1. That as to the allegation contained in paragraph 1, of the second cause of action, that "plaintiff is an alien, was born in foreign parts, and is, and at all the times hereinafter mentioned was, and now is, a citizen of the Kingdom of Great Britain and a subject of the King of Great Britain," defendant has no knowledge, information or belief sufficient to enable it to answer the said allegation, and therefore, and for that reason, and on that ground, denies that plaintiff is an alien, and is or was at all the times in the said complaint mentioned, or now is, a citizen of the Kingdom of Great Britain or a subject of the King of Great Britain.

2. Denies that between the 22d day of September, 1913, and the 23d day of January, 1914, or at any other time, or at all, the said plaintiff performed professional or any service [13] as a civil engineer, or otherwise, for the defendant, at its special



instance or request, or at all, in gathering data or preparing reports showing the estimates of the cost of construction of the defendant's proposed railroad from Red Bluff to Dixon, or the amount of the possible traffic thereof, or the amount of the possible financial returns therefrom to be received by the defendant, from the maintenance or operation of said railroad; denies that between the said dates, or at any other time, or at all, the said plaintiff rendered or performed any services of any kind or character for the said defendant.

3. Denies that said alleged services were or are reasonably worth the sum of Three Thousand, Five Hundred (\$3,500) Dollars, or any other sum; admits that said defendant has not paid said sum or any other sum; denies that said defendant has paid plaintiff the sum of One Hundred and Fifty (\$150) Dollars, denies that there is now, or was at any other time, or at all, due or owing from defendant to plaintiff an account of said alleged services, or otherwise, or for any services, the sum of Three Thousand, Three Hundred and Fifty (\$3,350) Dollars, or any other sum.

### III.

Further answering the said complaint, defendant avers as follows:

1. That the said defendant is, and was at all the times hereinafter mentioned, a corporation duly and legally organized under the laws of the State of California, for the purpose of constructing a railroad to be operated by electric or other motive power, except steam.

2. That under and by virtue of the laws of the State of California, the said defendant was at all of the times mentioned in the said complaint, and now is, subject to the jurisdiction [14] of the Railroad Commission of the State of California, and at said time was and is only authorized to enter into such contracts and to expend its funds for such purposes as were and are directed and ordered by said Railroad Commission of the State of California.

3. That at all the times alleged in said complaint the said defendant was not authorized and did not have legal authority or any capacity, right or power to make or enter into any contract with said plaintiff, as alleged in said complaint, or to employ said plaintiff to render any of said services, or to agree to pay the said plaintiff any of the sums alleged in said complaint; alleges that under and by virtue of the orders of the Railroad Commission of the State of California governing and controlling the disbursement and expenditure of the funds of the said defendant, none of said funds can be legally applied to the payment of the said obligations alleged in said complaint, or either of them.

4. Alleges that the said defendant had no legal capacity or authority to make or enter into the said contract alleged in said complaint, or to make or enter into any of the agreements alleged in said complaint.

WHEREFORE, the defendant prays that plaintiff take nothing by said complaint, and that it have judgment for its costs; and for such other and fur-

ther relief as may be meet and proper.

ARTHUR C. HUSTON,

Attorney for Defendant. [15]

[Endorsed]: Filed May 11, 1914. [16]

[Title of Court and Cause.]

**Findings of Fact and Conclusions of Law.**

The above-entitled cause coming on regularly to be heard in the above-entitled Honorable Court, before the Honorable William C. Van Fleet, the judge thereof on the 15th day of September, 1914, the plaintiff appearing by Jacob M. Blake, Esq., his attorney, and the defendant appearing by Arthur C. Huston, A. P. Black and George Clark, Esqs., its attorneys, and a trial by jury having been duly waived in writing, and said cause having been duly and regularly tried by said Court and by it ordered submitted, and the said Court on April 2, 1915, having duly rendered its decision therein, the Court now makes the following findings of fact:

1. That the plaintiff is an alien, was born in foreign parts and is, and at all the times mentioned in the complaint was, a citizen of the Kingdom of Great Britain and a subject of the King of Great Britain; that the plaintiff is and was, at all the times mentioned in said complaint, a resident and inhabitant of the State of California, and resided in the Northern District thereof at Berkeley in the County of Alameda in said State.

2. That the defendant is, and at all the times mentioned in the complaint was, a railroad corporation duly incorporated, organized and existing un-



der and by virtue of the laws of California for the purpose of owning, controlling and managing a railroad [19] for compensation within the said State; that said defendant was incorporated on May 4, 1912, and became, was and is a public utility as defined in the Public Utilities Act of the State of California; that the said defendant is, and at all the times mentioned in the complaint was, a citizen of the United States of America, and a citizen and resident of the said state of California, and a resident and inhabitant of the Northern Judicial District, with its principal place of business at the City and County of San Francisco in said state.

3. That on or about the 22d day of September, 1913, the defendant made and entered into a contract and agreement with the plaintiff wherein and whereby it employed the plaintiff as a consulting civil engineer to gather data and prepare a report showing the estimates of the cost of construction of the defendant's proposed railroad project in California, and of the amount of possible traffic, and of the probable financial returns therefrom to be received by the defendant from the maintenance and operation of its proposed railroad from Red Bluff to Dixon in the State of California, from an actual investigation of its proposed route in the field, and an examination of traffic conditions and of financial returns to be developed by the construction of defendant's proposed railroad in California as compared with the known earnings of other similar lines of railroad in the Sacramento Valley in said State; that at the time of entering into said contract, it was

understood and agreed upon the part of the plaintiff that he would cause the said report to be presented to financial interests abroad, that is to say; to parties in England or upon the continent of Europe who deal in the stocks and bonds of American railroad projects, by one W. J. Wilsey; that in and by the terms of said contract of employment as aforesaid, the defendant [20] promised and agreed to pay plaintiff for his services in furnishing said report, the sum of Three Thousand Five Hundred (\$3,500) Dollars as follows, to wit: Seven Hundred Fifty (750) Dollars to be paid on September 27th, 1913; Seven Hundred Fifty (750) Dollars on or before October 13th, 1913; Five Hundred (500) Dollars on November 3d, 1913; Five Hundred (500) Dollars on November 17, 1913, provided said report was completed by that time and if not, upon the completion thereof; and the balance of said whole sum of Thirty-Five Hundred (3,500) Dollars, amounting to One Thousand (1,000) Dollars to be paid when said defendant should hear from the said Wilsey from London, that the matter of the presentation of said report was receiving favorable consideration.

4. That said defendant never heard from the said Wilsey from London, that the presentation of said report upon the defendant's railroad project in California was receiving favorable consideration.

5. That on or about the 23d day of September, 1913, plaintiff entered upon the performance of his said contract with the defendant as aforesaid, and that thereafter and on or about the 1st day of Oc-

tober, 1913, and without fault on the part of the plaintiff, and while plaintiff was engaged in the performance of his said contract, the defendant herein repudiated its said contract with the plaintiff, and refused to proceed further in the performance of said contract upon its part, and by and through its president, one Charles L. Donohue, gave written notice to plaintiff to refrain from the preparation of said report; that prior to the repudiation of said contract by the defendant as aforesaid, the defendant accepted the performance thereof on the part of the plaintiff herein as aforesaid, and paid the plaintiff on account of said contract the sum of One Hundred Fifty (150) Dollars. [21]

6. That thereafter at various times between said first day of October, 1913, and the 23d day of January, 1914, the plaintiff offered to perform, and tendered upon his part, the performance of said contract to the defendant, and tendered also the services of the said Wilsey in the matter of the presentation of said report to said financial interests both in England and upon the continent of Europe, but that each and all of said tenders and offers to perform were by the defendant refused; and that ever since the first day of October, 1913, the defendant herein has wholly failed, neglected and refused, and still wholly fails, neglects, and refuses to perform upon its part the terms of the aforesaid contract with the plaintiff to the damage of the plaintiff in the sum of Twenty Three Hundred and Fifty (2,350) Dollars.

7. That it is not true, as alleged in the defendant's answer, that, under and by virtue of the laws



of the State of California, or by any other law or laws, the defendant was at all the times mentioned in the complaint, or now is, under the jurisdiction of the Railroad Commission of California to the extent that it was, or is, only authorized to enter into such contracts and to expend its funds for such purposes as were and are directed by the Railroad Commission of California.

8. That it is not true, as alleged in the defendant's answer, that, at all the times alleged in plaintiff's complaint, or at any other time, the defendant was not authorized and did not have the legal authority, or any capacity, right or power to make or enter into any contract with the plaintiff, or to employ plaintiff to render any of said services, or to pay to the said plaintiff any of the sums alleged in plaintiff's complaint.

9. That it is not true, as alleged in the defendant's answer, that, under and by virtue of the orders of the Railroad [22] Commission of the State of California governing and controlling the disbursement and expenditure of the funds of said defendant, none of said funds could be legally applied to the payment of said obligations alleged in plaintiff's complaint, or to any of them.

10. That it is not true, as alleged in the defendant's answer that the said defendant had no legal capacity or authority to make or enter into said contract, as alleged in the first cause of action in said complaint, or to make or enter into any of the agreements alleged in said complaint.

From the foregoing Findings of Fact, the Court

now makes the following CONCLUSIONS OF LAW:

1. That the plaintiff is entitled to have and recover from the defendant in the above-entitled action the sum of Twenty Three Hundred and Fifty (2,350) Dollars, with interest thereon from the first day of October, 1913, at the rate of seven per cent per annum, together with the amount of his legal costs and disbursements therein, and judgment is hereby ordered entered therefor, with a ten days stay of execution.

Dated at San Francisco this 10th day of May, 1915.

WM. C. VAN FLEET,  
District Judge.

Received copy of the within findings this May 10, 1915.

BLACK & CLARK,  
Attys. for Dft.

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*In the District Court of the United States, in and for the Northern District of California, Second Division.*

No. 15,759.

TAGGART ASTON,

Plaintiff.

vs.

SACRAMENTO VALLEY ELECTRIC RAIL-  
ROAD COMPANY, a Corporation,

Defendant.

**Judgment of Findings.**

This cause having come on regularly for trial upon

the 15th day of September 1914, before the Court sitting without a jury, a trial by jury having been specially waived by stipulation filed herein; Jacob M. Blake, Esq., appearing as attorney for plaintiff and George Clark, Esq., appearing as attorney for defendant and the trial having been proceeded with on the 16th, 17th and 22d days of September, 1914, and evidence oral and documentary upon behalf of the respective parties having been introduced and closed and the cause having been submitted to the Court for consideration and decision, and the Court after due deliberation having filed its findings in writing and ordered that judgment be entered herein in accordance therewith:

Now therefore, by virtue of the law and by reason of the findings aforesaid, it is considered by the Court that Taggart Aston, plaintiff, do have and recover of and from Sacramento Valley Electric Railroad Company, a corporation, defendant, the sum of Two Thousand Six Hundred Fourteen and 58/100 (\$2,614.58) Dollars, together with his costs herein expended taxed at \$——.

Judgment entered May 10, 1915.

WALTER B. MALING,

Clerk. [24]

[Seal] A True Copy, ATTEST:

WALTER B. MALING,

Clerk. [25]

At a stated term, to wit, the March term, A. D. 1915, of the District Court of the United States of America, in and for the Northern District of California, Second Division, held at the courtroom in the City and County of San Francisco, on Friday, the 25th day of June, in the year of our Lord one thousand nine hundred and fifteen. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

No. 15,759.

TAGGART ASTON,

vs.

SACRAMENTO VALLEY ELECTRIC RAIL-  
ROAD CO.

**Order Modifying Judgment.**

Upon motion of J. M. Blake, Esq., it was ordered that plaintiff's motion to vacate judgment and modify and amend findings be withdrawn. Defendant's petition for a new trial, heretofore heard and submitted, being now fully considered, it is ordered that the judgment herein be and the same is hereby modified by striking therefrom all allowance of interest prior to the date of the entry of the judgment; and that the petition for new trial be and the same is hereby denied. [26a]

---

[Title of Court and Cause.]

**Engrossed Bill of Exceptions.**

BE IT REMEMBERED that the above-entitled cause came on for trial in the above-entitled court



on the 15th day of September, 1914, before the Honorable William C. Van Fleet, District Judge, presiding, the plaintiff appearing by his attorney Jacob M. Blake, Esq., and defendant appearing through its attorneys A. C. Huston, Esq., and Messrs. Black & Clark. A jury was empanelled to try the case. During the taking of the testimony, the Court announced that it appeared that the issues involved were largely matters of law, particularly the defense setting up that the contract was not authorized by the Railroad Commission of the State of California and that the point required careful consideration. Thereupon the parties stipulated in writing for a waiver of a jury. The defendant duly requested the Court that it find and determine that defendant could expend its funds for only such purposes as were directed or permitted by the orders of the Railroad Commission of the State of California; that at the time alleged in the complaint defendant did not have legal authority and was not authorized in law to make the contract alleged [27] in the complaint or to employ plaintiff to render services or to agree to pay him the sums alleged in the complaint; and that under and by virtue of the orders of the said Railroad Commission controlling the disbursement and expenditure of the funds of defendants, its funds could not be legally applied in payment of the obligations mentioned in the complaint and that the Court should determine that plaintiff was not entitled to recover for said reasons. This request so made by the defendant was denied by the Court, the defendant noting its

exception, which was allowed by the Court.

The evidence bearing upon the point of said exception and the question of the legality of the contract was as follows:

**[Testimony of Taggart Aston, the Plaintiff, in His Own Behalf.]**

The plaintiff offered evidence in substance and effect that, prior to September 22, 1913, the defendant company planned the construction of a railroad from Red Bluff, in Tehama County, to Dixon, Solano County, California, and that plaintiff had learned of the defendant's project from Edwin E. Cox, and that Mr. Cox asked him to see if he could get one, W. J. Wilsey to undertake the selling of defendant's bonds, that this resulted in negotiations between W. J. Wilsey and the company, that Wilsey went over the line of the proposed road with the president and some of the directors of the company; that the president of defendant company, C. L. Donohoe, had, prior to September 22, 1913, stated to plaintiff that Mr. Wilsey, while so examining the project, had requested that plaintiff be employed to prepare a report of the cost and probable earnings of the proposed railroad which defendant desired to build; that Donohoe had stated that he desired plaintiff should meet with the directors of the company, for the purpose of informing [28] them as to what would be the requirements of such a report and the cost thereof, and that he, plaintiff, accordingly attended a meeting of the board of directors of the company in the Shreve Building at San Francisco, California on September 20, 1913, that he thereupon

submitted, at the request of the directors at the time of the meeting, a written proposition, that the members of the board all stated the proposition was fair and that a committee would be appointed to arrange the details of the contract, that the meeting was on a Saturday and that, on the Monday following, September 22, 1913, Mr. Donohoe sent for him, and that he met Mr. Donohoe and two other directors, Mr. E. L. Sisson and Mr. H. W. Manor at the office of the company; that Mr. Donohoe stated that the terms submitted by plaintiff were very satisfactory to the board, but that a change should be made so as to provide that the first payment should be two weeks from date instead of immediately, and that they wanted plaintiff to go ahead with the getting up of a preliminary report at once so that Mr. Wilsey, who was about to go to London, could take such report with him to London on the following week; that thereupon the follownig instrument was signed: [29]

**[Letter, September 22, 1913—Aston to Donohoe.]**

San Francisco, Cal., Sept. 22, 1913.

Mr. Charles L. Donohoe,

President Sac. Valley Electric R. R. Co.,

San Francisco, California.

Dear Sir:

Relative to our conversation this morning I am prepared to start on gathering data and preparing a report at once of your railroad project. Terms to be—

\$3500 for complete report and data,

750.00 to be paid a week from to-day,

750.00 in two (2) weeks from next Monday,

500.00 two (2) weeks thereafter,

500.00 two (2) weeks after that time, provided the last \$500 is not to be paid until my report is completed and \$1000.00 on your hearing from Mr. Wilsey, from London, that the matter is receiving favorable consideration.

In the event of Mr. Wilsey reporting to you that the matter is not to go through, the last \$1000.00 is not to be paid.

I am prepared to give Mr. Wilsey preliminary data and report to take with him within the next week or so.

My report will be complete, showing the estimates of cost of construction in detail and possible traffic and returns for the road, based upon actual investigation in the field and examination of traffic conditions and possibilities of returns for your railroad and comparisons with the possible earnings of this road as compared with the known earnings of other similar roads in the Sacramento Valley. A copy of my report will be delivered to your company upon completion.

Of course you will give me every facility you may have for travelling in the Valley.

Yours very truly,

(Signed) TAGGART ASTON,

Consulting Engineer.

The above approved.

(Signed) E. L. SISSON,

(Signed) H. W. MANOR,

(Signed) C. L. DONOHUE,

Directors.



Sept. 22d, Pd. \$150 on a/c and started work on report. (Signed) Taggart Aston. [30]

That E. L. Sisson was secretary and H. W. Manor vice-president of the company.

The plaintiff further testified the endorsement regarding the payment occurred, as follows:

On the morning of September 23, 1913, plaintiff called on Mr. Donohoe, the president, and stated the work of preparing the preliminary report was involving considerable expense and something should be paid on account, and that thereupon Mr. Donohoe paid him the \$150.00 and that he proceeded with the work under his contract.

The plaintiff testified that the proposition as first drafted was as follows: [31]

**[Letter, September 22, 1913—Aston to Donohoe.]**

San Francisco, Sept. 22, 1913.

Mr. Charles L. Donohoe,

Pres. Sacramento Valley Elec. R. R. Co.,

San Francisco, California.

Dear Sir:

Relative to our conversation this morning, I am prepared to start gathering data and preparing a report at once of your railroad project. Terms to be, \$3,500.00 for complete report and data, \$750.00 to be paid at this time, \$750.00 in two weeks time, \$1,000.00 on completion of report, and \$1,000 on your hearing from Mr. Wilsey from London, that the matter is receiving favorable consideration.

In event of Mr. Wilsey reporting to you that the matter is not to go through, the last \$1,000.00 is not to be paid.

I am prepared to give Mr. Wilsey preliminary data and report to take with him within the next week or so.

Of course, you will give me every facility you have for travelling in the Valley.

Yours very truly,

(Signed) TAGGART ASTON,

Consulting Engineer. [32]

The plaintiff further testified that about October 1, 1913, he received a letter from Mr. Donohoe, as follows:

(Here insert Plaintiff's Exhibit 3.) [33]

[Letter, October 1, 1913—Donohoe to Aston.]

San Francisco, Oct. 1, 1913.

Mr. Taggart Aston,  
Foxcroft Building,  
San Francisco, Cal.

Dear Sir:

Relative to the report which it has been proposed you shall make for the Sacramento Valley Electric Railroad as to the cost of construction and possibilities of revenue of the proposed railroad of said company, will say that owing to a recent order of the Railroad Commission of the State of California, it becomes necessary to notify you to refrain from the preparation of said report as there is no way provided for paying you for such report at the present time.

It is also apparent that Mr. Wilsey is not going on the proposition suggested.

Please return to this office the maps, profiles, and data furnished you in the matter.

Yours respectfully,

(Signed) CHARLES L. DONOHUE. [34]

To which the following was plaintiff's reply:

[Letter, October 2, 1912—Aston to Donohoe.]

October 2, 1912.

Chas. L. Donohoe, Esq.,

Sacramento Valley Electric R. R. Co.,

San Fransisco, Cal.

My dear Sir:

I have your letter of yesterday in which you intimate that a ruling of the R. R. Commission has placed you in the embarrassing position of not being able to proceed with the financing of your road.

With regard to the contract made with me, dated September 22d, as instructed by you I went ahead at once with the preparation of the report, have made considerable progress upon it, and have already completed the preliminary report. However, I shall be glad to convenience you in any way possible that may not injuriously prejudice my position in the matter.

I am,

Very truly,

(Signed) TAGGART ASTON. [35]

Defendant offered evidence in substance and effect that at the meeting of the board of directors on September 20, 1913, it was stated on their behalf that no contract would be made with the plaintiff, unless it was approved by the Railroad Commission and that the meeting adjourned without the giving

of assent to any proposition and with the understanding that Mr. Wilsey was to come from Portland to San Francisco to meet the board and that any proposition for the sale of the company's bonds or for the employment of plaintiff was to be taken up at the next meeting of the board; that it was not stated that any committee or members of the board would act for the board in making a contract with plaintiff, but plaintiff denied that any such statements were made in his presence. The defendant further offered evidence to the effect that, at the time the document, Plaintiff's Exhibit 3, was signed, it was stated by Mr. Sisson and Mr. Manor that it expressed what they would be willing to agree to if the Railroad Commission approved such a contract, but this was denied by the plaintiff.

The plaintiff, on rebuttal, testified as follows:

“Mr. BLAKE.—Q. At the meeting of September 20th of the board of directors of the present company was there anything said or done which would make your proffer of services contingent upon getting the sanction of the Railroad Commission?

A. No. Mr. Blake, the only recollection I have of any conversation of that was that the directors endeavored to find some way of paying me that would comply with their powers; and on Monday afterwards they had apparently thought it over and they found out by paying me in these installments they would be able to do so. Of course, I was not concerned as to how they paid me or how they got the money, I simply knew that they wanted my services.”



Plaintiff further testified that he was, at the time of making of the contract, familiar with the fact that, during Mr. Wilsey's trip over the line of the proposed road, Mr. Wilsey [36] had advised Mr. Donohoe that the company would have to put up \$5,000 to cover his, Wilsey's, expenses, that Mr. Donohoe had told him that Mr. Wilsey had written him to that effect. The plaintiff further testified:

"Seeing there was no way for the company to pay those expenses I had promised in consideration of Mr. Wilsey *allow-me* something out of the commissions that he might receive if he put the matter through, I had promised out of any money that I might receive to pay those expenses of Mr. Wilsey, and he said he would pay half of them himself; he expected them to come to \$5,000; he said he would not ask the company or ask me to become responsible for more than \$2,500. I wrote and told Mr. Wilsey, or wired him, I forget which."

Telegrams passed between plaintiff and Wilsey, as follows: [37]

**[Telegram, September 24, 1913—Aston to Wilsey.]**

Berkeley, Cal., Sept. 24, 1913.

Wm. J. Wilsey,

504 Selling Bldg.,

Portland, Oregon.

Payments guaranteed by Donohoe and Manor as per contract. Donohoe at Willows. Returns Friday but from phone conversation had with him this evening, I feel matter can be arranged to your satisfaction on Friday morning. Shall wire you then; your attitude correct, have strengthened my hand.

ASTON. [38]

[Telegram, September 26, 1913—Aston to Wilsey.]

San Francisco, Sept, 26, 1913.

Wm. J. Wilsey,

504 Selling Bldg.,

Portland, Ore.

Donohoe unable return here until tomorrow therefore situation unchanged. I have ample guarantee money will be paid as per agreement. Wish you would not press matter on full immediate payment further until you come here Tuesday as embarrasses me seriously and am doing everything I can possibly do in your interests and to meet your requirements shall pass guarantee on to you in any way you wish upon your arrival Tuesday. You will then find Donohoe and directors willing and anxious to meet your wishes in every way possible. I shall ask Donohoe to wire you tomorrow.

TAGGART ASTON. [39]

The secretary of the company, Mr. Sisson, testified that the board of directors were at all times kept informed of the negotiations that were being carried on between Mr. Donohoe and Mr. Wilsey, and of the making of the preliminary report by Mr. Aston.

The following additional testimony was given by plaintiff:

“The COURT.—Q. But you were talking with Wilsey about the amounts required for his expenses; that had nothing to do with your contract?

A. No; nothing to do with mine; I had not guaranteed—and I told Mr. Wilsey that inasmuch as the

company said it was impossible under the Railroad Commission's ruling to pay that money, they could arrange the money in installments so they could pay it.

Mr. CLARK.—Q. Who said to you it was impossible under the Railroad Commission's orders?

A. I think Mr. Donohoe said it would be impossible to pay the large amount of \$5,000 to Mr. Wilsey; he said it would be too large an amount unless they made an application to the Railroad Commission.

The COURT.—Mr. Aston, I don't understand you. Had you made a proposition to Mr. Wilsey that you would yourself pay him the installments that you received from the company?

A. I told Mr. Wilsey that I would hold myself responsible for the payment of the \$2,500 to him."

\*      \*      \*      \*      \*      \*      \*      \*

A. Mr. Donohoe told me he had written to Mr. Wilsey to come here on his way through; Mr. Wilsey arrived here I think on or about the 28th of September, and he was very much surprised on his arrival to find that no directors' meeting had been called as he had been asked to meet the directors, the board.

Q. This was after he had been here the first time?

A. Yes, when he was on his way through to Europe. Mr. Wilsey [40] and myself then met three of the directors, the president, the vice-president and the secretary, in consultation and he expressed himself as somewhat displeased that they had not paid me first of all the first installment as

due upon my contract so as to enable me to arrange for part of the expenses, nor had they made any proper endeavor to arrange for a further payment as he was on his way, and he considered they should have put these expenses up through me before he left, or should have enabled me to put up these expenses before he left. They expressed regret and stated that it was owing to some ruling of the Railroad Commission that had been made lately, that they had not been able to keep the terms of their contract with me, and they asked him could he not in some way arrange it so that those payments might be made later and would he not go on to London and proceed with the business. He asked them to go out of the room and try to think over some way of getting over that difficulty. They went out of the room and they came back, and Mr. Donohoe said, "Well, we can't think of any way of getting over the difficulty." "Well," Mr. Wilsey said—

Mr. CLARK.—(Intg.) Pardon me, I do not like to interrupt the thread of your narrative, but will you please state when that occurred?

A. I think about on the 28th or 29th of September; it was the day that he left for London. I think it was on the 29th, Mr. Clark; they then said, "Mr. Wilsey, can't you think of any way of helping us out of this difficulty." He then said, "Gentlemen, I will lend you the money," with the understanding, of course, that they would pay all the installments as they came due. Then they said they could not even pay those installments, they could [41] not even live up to the arrangements they made with



me. He said, "Well, it is strange you can't comply with the arrangements you made with him." He said, "You have called me down here to meet your board of directors, you know I am on my way to Europe to carry your deal through and you have fallen down in every way on all the arrangements you had previously made about me going to Europe. Now," he says, "gentlemen, I am not debarred from going to Europe." He drew a draft of \$2,500 out of his pocket, and said, "I have lots of money to go to Europe on and I am going to Europe." The last words Mr. Donohoe said, before he went away, were, "I hope you will still see your way clear, Mr. Wilsey, to take our matter up in Europe."

\*      \*      \*      \*      \*      \*      \*      \*

"A. Well, preliminarily, after October the first and second, when Mr. Donohoe wrote me on October 1st asking me to refrain, and when I replied that I would not sacrifice my legal position in the matter in regard to the contract, Mr. Sisson, the secretary, called at my office, and I told him just previous to Mr. Wilsey leaving, and an hour or so after the meeting had with the directors of the company, Mr. Wilsey had told me that he would take the matter up in London, and Mr. Sisson was very pleased indeed to hear of it. That was one or two days after Mr. Wilsey left. I said, "Now, I want certain other documents from the company"; I asked him to give me all the documents and maps that they had not previously given me, and he went up and brought me down—I think I may have gone up to

get them—however, I received all the documents that were necessary for the completion of my data. I handed Mr. Sisson my draft report, he brought it up and the company had the report typed, and four or five copies were made of it. [42]

Q. Now, you are speaking of what time, and with respect to what report?

A. With respect to the preliminary report. That was after I received the letter from Mr. Donohoe asking me to refrain.

Q. That was on what date?

A. That was on or about the 3d or 4th of October."

\* \* \* \* \*

"A. When Mr. Wilsey left he was very angry with Mr. Donohoe, and he said, "Mr. Aston, for a day or two don't tell Mr. Donohoe, I will take this up." Before he left, I said, "Mr. Wilsey, I sincerely hope you will see your way to take this up." Mr. Wilsey told me—he said, "Just let Mr. Donohoe stew for a day or two, don't tell him I am going to take it up, but you can tell Sisson and the other, you can tell Sisson and the other directors; Donohoe has not been fair with me, bringing me down here and not having the directors' meeting."

The following letters passed between Mr. Donohoe and Mr. Aston, Mr. Aston and Mr. Sisson, and Mr. Donohoe and Mr. Cox: [43]

**[Letter, November 11, 1913—Aston to Donohoe.]**

S F., Nov. 11, 1913.

Mr. C. L. Donohoe,  
Shreve Bldg.,  
San Francisco.

Dear Sir:

Referring to your cablegram to Mr. W. J. Wilsey of the 8th inst., in which I understand you expressed regret that uncontrollable circumstances had previously deterred you from acceding to what you described as his reasonable request for out of pocket expenses, and in which you asked him what inducement you could now offer to have him remain in London to push your railway and land deal,—I feel that Mr Wilsey must already have obtained encouragement in the tentative efforts which he advised me he would make by using my report prepared upon your instructions, as he has replied to me to the effect (his cable does not *decode* very clearly) that he has no further business on hand, but will remain in London to carry out your deal if you will furnish amount for expenses.

This cable I have shown you to-day. No as you have already expressed yourself that Mr. Wilsey's request was a reasonable one, and as you asked him in your cablegram to name his terms to remain over in London to further arrangements for underwriting, I cannot, therefore, now understand your inconsistency in refusing to consider paying said expenses, or even to cable him a reply. And as it would not be fair to ask him to waste further time,

as you seem to have been fooling him right along, I am therefore cabling him that expenses will not be allowed to enable him to remain in Europe in your interests. Owing to indifferent business conditions now prevailing in Europe, Mr. Wilsey would probably have to remain there until the end of January, 1914, in order with any hope of success, to devote himself exclusively to your business.

I am,

Very truly yours,

(Signed) TAGGART ASTON. [44]

[Letter, November 14, 1913—Aston to Donohoe.]

San Fransisco, Nov. 14, 1913.

Mr. C. L. Donohoe,

Pres. Sacramento Valley Elec. Ry. Co.,

San Francisco.

Dear Sir:

I herewith enclose you copy of a letter of even date, which I have mailed to E. L. Sisson.

I also be g to advise that, in Mr. W. J. Wilsey's letters to me of Oct. 30th and Nov. 1st, received to-day, he states he had just received my report and S. V. E. R. R. plans and documents and was going to give the matter attention as soon as he had completed other business then in hand. In both letters he stated his belief that he could finance your 50,000 acres of land at once, but that the Railway financing would be slower as his underwriters were not taking new business until they had disposed of balance of last 8 months issues.

In a cable dispatch since, however, Railroad financing would appear to have taken a more favor-



able turn, as he had parties in Brussels and Antwerp and proposed going there early next week—if expenses were provided—otherwise he intended coming home.

Of course, before carrying negotiations very far he would require final reports and other documents, and the expense of remaining in Europe in your interests would therefore be very great for the necessary length of time to be devoted to you and your company's interests.

Very truly yours,

(Signed) TAGGART ASTON. [45]

**[Letter, November 19, 1913—Sisson to Aston.]**

Red Bluff, California, Nov. 19, 1913.

Mr. Taggart Aston,

526 Foxcroft Bldg.,

San Francisco, Cal.

Dear Sir:

Your letter in reference to your interview with Mr. Donohoe received. Mr. Donohoe is certainly acquainted enough with the conditions to know what to do. Under the last order of the Railroad Commission it is impossible to spend any money for engineer reports or expenses such as you suggest.

If Mr. Wilsey can do nothing unless his expenses are advanced, then I am of the opinion nothing can be done. When in the City I will try and see you.

Very truly yours,

(Signed) E. L. SISSON. [46]

[Letter, November 14, 1913—Aston to Sisson.]

San Francisco, November 14, 1913.

Mr. E. L. Sisson,

Secy. Sacramento Valley Elec. Ry. Co.,

Red Bluff, California.

Dear Mr. Sisson:

Mr. Donohoe cabled Mr. Wilsey last Saturday to the effect that he regretted uncontrollable circumstances had previously prevented him from acceding to his reasonable terms, that he felt he (Wilsey) could do the business, and asked his terms to remain in Europe to complete it. Mr. Wilsey replied to me to the effect that his other business was finished, but that he would remain to complete your deal if necessary expense money was cabled. He has got parties in Brussels and Antwerp and was prepared to go there next Tuesday.

Mr. Donohoe has since said that he regretted sending his cable and now states he will not pay one cent toward Mr. Wilsey's expenses of remaining over. Such action is difficult to understand, as it would only have been necessary for him to immediately conform to his contract with me in order to have enabled me to supply these expenses and have the matter go forward. His refusal to do so is nullifying all my *effects*, and is causing me serious damage.

As you are aware Mr. Wilsey was even to loan the money for expenses, if guaranteed. And Mr. Donohoe refused to guarantee me the money he had contracted to pay me even after he had promised to guarantee it. It is impossible to do business in the

face of such inconsistency and broken promises on Mr. Donohoe's part.

The delay will fall through unless you and the other directors take the matter up. I should be glad to see you and Mr. Huston at the earliest possible moment you can come here.

Yours very truly,

(Signed) TAGGART ASTON. [47]

**[Letter, December 24, 1913—Donohoe to Aston.]**

Willows, California, Dec. 24, 1913.

Mr. Taggart Aston,

Foxcroft Building,

San Francisco, Calif.

Dear Sir:

I am in receipt of your letter relative to the estimate on cost of construction and probable traffic returns in the Sacramento Valley Electric Railroad. I went all over this matter with Mr. Wilsey and he stated to me that any expert who knew anything about electric roads would be convinced beyond question that the road would pay from the start by making trip over the proposed line, and I am convinced that any engineer who comes out here who is not familiar with the result of electric interurban roads, will not be a proper person to make an unbiassed report, and if he is familiar with the result of these roads, he will know as soon as he goes over the territory that this will be a paying road.

I have had Mr. Pohl of Bogart & Pohl, one of the most proficient engineers in New York City, over the line, and he made a report that the road would pay from the start, even on Mr. Dozier's cost of con-

struction, and he figured it all out. You have a copy of his figures included in his report. Any one knows the general rule is the first year no interurban road, as a matter of fact, pays much profit, but it takes a year or so to build up the business and get it on a paying basis.

Even with the figures you have there, the road will pay from the day it starts, that is—it will pay all fixed charges. The 6% on the preferred stock is not an obligation unless it is earned by the road, and no bond issue would provide for a sinking fund for at least five years. It is always provided in these matters that a corporation shall have a leeway of a few years [48] before applying its earnings to the sinking fund, otherwise no public utility such as this could be started or financed. Even with the figures contained in your letter it has a remarkably good show.

Burnett in his estimate, has been extremely conservative.

Mr. Pohl, of Bogart & Pohl, have been several weeks in the Valley estimating matters carefully and his report shows even on his estimate of cost, the road will earn a surplus the first year of about \$90,000.

If any expert engineer is sent out here and will go over the line, and report it will not pay, then we can not hope to do anything with anybody he represents, because he does not know his business. If you were to work on this for the next five years, you could not gather any more data that we already have.

We have the data prepared by Mr. *Dozer* concern-



ing the traffic and possible revenue, a letter compiled by Mr. Janes and a letter prepared by Mr. Burnett as to the traffic and possible revenue, also data prepared by Mr. Pohl as to the traffic and possible revenue, and I cannot see as we can get anything else. If you cannot take these reports and by going through them make out a report that is satisfactory it is probably hopeless for us to try to do anything with the people yourself and Mr. Wilsey represents.

If you have not all these reports and want them, go over to the office at 1006 Shreve Building and ask Miss Ketheryn to call me up and I will authorize the delivery of them to you.

Yours truly,

(Signed) C. L. DONOHUE. [49]

**[Letter, December 24, 1913—Donohoe to Cox.]**

Sacramento Valley Realty Co., Inc.,

Willows, Cal., December 24, 1913.

Mr. Edwin E. Cox,

1002 First Nat. Bank Bldg.,

San Francisco, California.

Dear Sir:

I herewith enclose you a copy of letter I have written to Mr. Aston. We have all the data that we can get on the subject. In addition to that, Mr. Aston can go over to the Railroad Commission and get the gross earnings per mile for the last two years of the Northern Electric, Sacramento and Woodland Central California Traction, and other electric roads, and then he can make a comparison of the territory covered by these roads and the territory covered by

ours, and take the earnings per mile and apply it to 160 miles of road and he will immediately see that our road will earn a very large amount of money in the first year over and above all fixed charges and sinking fund.

There is nothing more Aston could do if he tried. Of course, if he comes to the conclusion that the road will not pay there is no use of dealing with Wilsey on those bonds; however as stated in my letter to Aston, Wilsey is absolutely certain himself that the road will pay and any engineer expert that knows anything about the interurban roads will state immediately upon looking over the territory that the road will pay.

It is a very difficult thing to gather data in matters of this kind and the best evidence is the comparison of our territory with the territory of other roads that are paying.

I do not know of any way to help this matter out as Aston might travel over the country here for twenty years and he would not gather any more data than that mentioned in my letter to him.

Yours very truly,

C. L. DONOHUE, [50]

The plaintiff further testified concerning his efforts to bring Mr. Wilsey and the company together on a contract to market its bonds in England or upon the Continent of Europe, as follows:

“Mr. CLARK.—Q. As I understand you on direct examination, you testified that before you had signed this proposition or these propositions addressed to Mr. Donohoe as president of the company,

Mr. Donohoe had said to you that the Railroad Commission would not allow payments to Mr. Wilsey?

A. Mr. Donohoe said that he did not know whether they would or not. How could Mr. Donohoe say that if he had not been before the Railroad Commission. He could not possibly say they would not allow it if he had not asked their approval. The reason for Mr. Donohoe and Mr. Wilsey not going before the Railroad Commission was so that it would not be made public that Mr. Wilsey was endeavoring to underwrite this because the Southern Pacific would immediately know who Mr. Wilsey's principals were. That was the reason Mr. Wilsey did not want to go before the Railroad Commission."

The following further evidence was then given with regard to the negotiations for a contract between the company and Mr. Wilsey for the sale of the company's bonds abroad:

"Mr. CLARK.—Q. Did Mr. Wilsey talk with you before you addressed these written propositions to the company, did he talk with you separate and apart from Mr. Donohoe about the fact that the Railroad Commission should not be approached with this proposition or this bargaining?

A. Yes, sir. When Mr. Wilsey was down in August he said he would not like his name to appear in this matter because it would nullify all his efforts in London. He said the Southern Pacific would know at once who his [51] principals were and they would take steps through secret channels to nullify his efforts in financing the company.

Q. Did you and Mr. Wilsey discuss the fact that

It would be prejudicial to you if this matter of bargaining with the company was submitted to the Railroad Commission?

A. Do you mean to me personally.

Q. To your vendor?

A. To the vendor, yes.

Mr. BLAKE.—To his vendor or to Mr. Wilsey's vendor?

A. To the company's vendor; it would nullify our efforts. We understood that thoroughly.

Mr. CLARK.—Q. How long before you submitted this proposition to the company, these written propositions to the company of September 22, 1913, was it that you had talked with Mr. Wilsey in regard to this?

A. Mr. Wilsey was down a few weeks before that; he arrived in San Francisco from Red Bluff with Mr. Donohoe. He had been over the line with Mr. Donohoe and the other directors. He arrived in San Francisco and I saw him when he arrived in San Francisco.

Q. Did you talk over with Mr. Wilsey the communications between Mr. Donohoe and Mr. Wilsey so as to keep conversant with their negotiations?

A. Naturally I would talk over any communications that had passed prior to that time.

\* \* \* \* \*

Q. How long prior to September 22, 1913, was it that you first talked with Mr. Wilsey about the impropriety of presenting to the Railroad Commission the terms of employment of Mr. Wilsey for the purpose of selling the bonds or stock of the company?



(Testimony of Taggart Aston.)

A. There was no question about presenting to the Railroad Commission the terms of employment of Mr. Wilsey. [52]

Q. What I mean is this; how long prior to September 22, 1913, was it that you first talked with Mr. Wilsey about that being a bad plan, the matter of presenting this thing to the Railroad Commission?

A. At the time of Mr. Wilsey's visit to San Francisco, after he came down from Red Bluff; I cannot give you the date of that; I cannot tell whether it was the end of July or the beginning of August or the beginning of September. I think it was about the end of August or the beginning of September."

\*      \*      \*      \*      \*      \*      \*      \*

Q. Did you understand, before Mr. Wilsey went to Europe, that before this company would make any final contract with Mr. Wilsey for the disposition of its stock and bonds, it would be compelled to submit the proposition to the Railroad Commission?

A. It was understood that before any deal with any underwriters could be completed the terms of such underwriting would have to be submitted to the Railroad Commission.

Q. You understood that to apply to both the sale of stock and bonds of this company?

A. I understood that, yes, sir."

It was admitted defendant was incorporated as a common carrier and was within such jurisdiction as the Railroad Commission of the State of California has over a state railroad corporation.

The following correspondence between W. J. Wil-

(Testimony of Taggart Aston.)

sey and Mr. Donohoe, president of the company, with respect to the contemplated contract between the company and Mr. Wilsey for the sale of said bonds, was received in evidence: [53]

**[Letter, September 15, 1913—Donohoe to Wilsey.]**

San Francisco, Sept. 15, 1913.

Mr. W. J. Wilsey,  
Palace Hotel,  
San Francisco, Calif.

Dear Sir:

Your communication, relative to financing of the railroad, received and seems satisfactory except as to the advancing you expenses of your trip to Europe, not to exceed \$5,000.

The order I have from the Railroad Commission, under date of Aug. 13th, 1912, permitting us to proceed, provides:

That we can not incur an indebtedness or make a contract for more than \$1,000.00 without obtaining the approval of the Commission.

In order to comply with your demand in this respect we would have to go to the Commissioner and necessarily have a hearing on the matter, and it would have to be disclosed to whom the money was going and the purpose of the same, and that would become a public record and might possibly be disastrous to our plans. In addition we would have to make a showing as to the probabilities and possibilities of your success in the matter.

I had hoped that the commission of  $2\frac{1}{2}\%$  would be sufficiently large to justify you financing your

own trip, and, necessarily, you must know now the possibilities of your success and from our conversation it would seem that you are not taking much chance in the matter.

I would like to hear from you on the subject.

(Signed) Yours very truly,  
CHARLES L. DONOHUE. [54]

[Letter, September 15, 1913—Donohue to Wilsey.]

San Francisco, Sept. 16, 1913.

Mr. W. J. Wilsey,  
Selling Bldg.,  
Portland, Oregon.

My dear Mr. Wilsey:

After considering your proposition which involves the bearing of your expenses on a trip to Europe, in connection with the business we have been discussing, during the last week; if it were a clear brokerage matter involved your contention for these expenses would be perfectly right, but, as I view the situation, it has an entirely different aspect.

In our recent past week's association, I am frank to say that, in my business career, I have never met anyone else for whom I have felt so friendly in so short an acquaintance and, in addition to that, my investigations of you have developed a feeling of trust in any transactions I might have with you so that I would feel justified in entering into any business arrangements, so far as you are concerned, on practically an oral understand—if necessary.

In our recent trip down the valley, I endeavored to be perfectly frank with you and showed you the inside of the important things I have been working

on for the past three years, hoping of course that by doing so I would enlist your interest,—not in the nature of a brokerage business,—but in closer relationship of practically a partner.

It seems to me that in the scheme, as I outlined it to you and which you approved, there should be a great deal of money in it for you and I and any others connected with us. From my viewpoint, if this money is procured, the profits cannot [55] fail, and I think you feel the same way.

I have expended three years of my time, and a great deal of money, in getting this scheme up to its present, and, as you expressed it—“perfect condition”—and am willing that you should enter into the matter on an equal basis with myself in consideration of you procuring the necessary capital which I am confident you can do; and I feel also that it is nothing but fair that you should assume, in connection with it, at least some of the risk.

You are going to Europe anyway. In fact, I understood you to say that your arrangements have been made to leave here about the 25th for New York, and the taking over of our proposition would not cost you any additional expense.

I have disclosed to you everything with this scheme and I do not regret doing it, and I did so to show you that I had absolute trust and confidence in your ability to get the needed financiers to put the deal over with profit.

I am willing of course to enter into any arrangement that may be necessary to secure you in your interest in the result of the enterprise, and I hope



you will see your way clear to take the matters up for our joint benefit without the advancement of any expenses.

You realize as stated in my letter of last evening, that it would be disastrous to our whole scheme for me to go to the Commission for an order authorizing this expense, and there is no way to charge this item of expense without disclosing the real nature of it, and it would be a hazardous thing to do in any event. That of course you will readily understand. It would involve a public hearing which, under all conditions, must be avoided. [56]

I will appreciate a frank and friendly letter from you on the subject at an early date.

Of course, I would be willing to guarantee to you the paying back of your expenses for your trip, not to exceed \$5,000.00, in the event that your mission in our behalf there should fail through any cause which originates with us.

Yours very truly,  
(Signed) CHARLES L. DONOHOE,  
President. [57]

[Letter, September 18, 3—W. J. W. to Donohoe.]  
Sept. 18, —3.

Mr. C. L. Donohoe,  
Shreve Building,  
San Francisco, Calif.

Dear Mr. Donohoe:

I received your note from Mr. Cox late in the evening and did not take time to answer same before leaving for home, but notified Mr. Cox what I thought of the whole matter. No doubt he has

informed you so I will not go into the details mentioned in your letter.

I quite understand the difficulty with the Railroad Commission in California, but you people who are largely interested should not hesitate to gamble on such a splendid enterprise.

With my best wishes to you and your project, I am

Yours very truly,

(Signed) W. J. W. [58]

**[Letter, September 18, 3—Wilsey to Donohoe.]**

Sep. 18, —3.

Mr. C. L. Donohoe,

Shreve Building,

San Francisco, Calif.

My dear Mr. Donohoe:

I have your kind letter of Sept. 16th, and note carefully the contents. Taking up your arguments each in turn permit me to say:

That if you went to any reliable brokerage house in the United States, England or France and asked them to finance this matter, they would ask you for a deposit five times as large as I have asked for expenses. I have had this experience, and they would not then give you as strong connections as I have at the present time, and no brokerage house connected.

I have all confidence in you and your associates whom I have met and will say that your word to me is as good as your bond. If I did not feel this way I would have ended the matter at the end of our journey, but you more than convinced me in all matters pertaining to both yourself and your enterprise.

I appreciate the statement of your taking me in

with you as practically a partner, and assure you that if I undertook the financing of this project I should take the same interest pertaining to the same as you and your associates would, as I feel, like yourself, that if we can finance the project along lines laid down, there should be large profits for all concerned.

You say that you have expended three years and a great deal of money in getting your project in [59] "perfect condition" and you think I should assume some of the risk. Dear Mr. Donohoe, I have spent seven long years and thousands of dollars securing the connections I now have, and I am willing to put my services and those connections at your command, asking you only to meet the expenses necessary, and it seems to me if those connections and my time are not worth putting this small amount of money against, that you cannot have much faith in my ability to do business. In other words, you ask me to give you those connections, give you my time, and use my own money for expenses to finance your deal, and, if possible, hand it *hand it* back to you finished, and you take no risk however. The time alone that I will have to put into this deal is worth more to me than three times the expense money, yes, five times the expense money, and I would not undertake the deal if I did not honestly believe I could finish it.

I told you on several occasions on the trip that if I went to Europe I would want to leave here by the 25th of September, so that I might be able to take advantage of the best time of the year to do business

there, namely, between October 15th and the holidays.

I have nothing to take me there now as I am just closing up a large real estate matter on Coos Bay, which I believe I showed you. This deal will keep a man busy, as the matter involves eleven millions all told, and it can't be put over in a week.

You are quite right in not going before the Railway Commission. That must not be done in any event, but it seems to me that a small amount subscribed by each of you gentlemen interested would mean but little to you, to assist in putting [60] the deal through, as no matter where you do this business, when it comes to be done you will have to meet this same question, and in a much larger degree, as any broker will have to work up his syndicate. I do no business with brokers, and my syndicates are already established beyond question.

You say that you will be willing to guarantee the payment back to me of the amount named should I not be able to put the deal through. This puts the shoe on the other foot; in other words, it means that I loan this money; if I fail it is paid back. Now, I leave it to you, don't you think it only fair that you should gamble this expense money against my time and connections? If you were not satisfied with me, you would not make the above proposition to pay back. If I were not satisfied with you and your project, I would not gamble my time and connections against your money.

Now, I have tried to be frank and friendly with you and I appreciate that you have been so with me,



and I assume you that any and all the information you have given me well be held in strict confidence should we not be able to arrive at any agreement, and I give you my best wishes for your successful placing of this splendid deal, but I cannot close up my business affairs here for some months, and just at this time, and devote all my time, energy and money on this deal, and take all the chances, while you and your associates take no chances. **If we** gamble on this deal, let us at least even up the hands, as you are a man of the world and know that all such things as this are a gamble.

You should receive this letter on Saturday A. M., in time for your meeting, and I shall have to know at once so that I can spend the following week closing up matters. Would you do me the favor of writing me your final conclusion?

With esteem and friendship, I am,

Yours truly,

(Signed) WILSEY. [61]

**[Telegram, September 22, 1913—Donohoe to Wilsey.]**

TELEGRAM.

San Francisco, Sept. 22, 1913.

W. J. Wilsey,

504 Selling Building,

Portland, Oregon.

Your proposition acceptable Directors desire personal conference prior to execution of formal agreement have made satisfactory arrangements with Aston who has commenced on report. When can you be here on way to England.

(Signed) C. L. DONOHOE. [62]

**[Telegram, September 22, 1913—Wilsey to Donohoe.]**  
**NIGHT LETTERGRAM.**

Sept. 22, 1913.

C. L. Donohoe,  
Shreve Building,  
San Francisco, Calif.

Telegram received. I plan to sail from New York on October fourth. My business affairs here must be arranged before leaving, so it is just possible will not have time to go via Frisco. Better send all documents here. If I have time will meet you on the twenty-ninth.

WILSEY. [63]

**[Telegram, September 23, 1913—Donohoe to Wilsey.]**  
**TELEGRAM.**

San Francisco, September 23, 1913.

W. J. Wilsey,  
Selling Building,  
Portland, Ore.

What document do you require. Can have them ready here on your arrival twenty-ninth. It is essential that my directors have conference with you. Will arrange to have directors' meeting 29th. Answer.

C. L. DONOHOE. [64]

[Telegram, September 23, 1913—Wilsey to Donohoe.]

LETTERGRAM.

Sept. 23, 1913.

Mr. C. L. Donohoe,  
Shreve Building,  
San Francisco, Calif.

In order to settle my business affairs here and meet *you* board will arrange sail on October seventh. Arrive Frisco Tuesday morning. Must leave there Wednesday morning direct New York. Aston can tell you what documents needed. You make real estate statement number acres, place, price and prepare maps of same.

WILSEY. [65]

The plaintiff testified that, for introducing Mr. Wilsey to the company, he understood he was to receive a share of the profits which Mr. Wilsey might receive, although there was no definite agreement as to the matter; that he met Mr. Wilsey at times at his hotel in San Francisco and was familiar with the position taken by the company in its letters to Mr. Wilsey.

[Testimony of A. C. Huston, Counsel for Defendant.]

A. C. Huston, counsel for defendant, testified, in substance: That he as one of the directors of the defendant, in September, 1913; that the board consisted of seven members; that, as attorney for the company, he had prepared the Articles of Incorporation, dated April 26, 1912; that on May 31, 1912, he prepared the company's application to the Railroad Commission of the State of California for

leave to issue and sell its stock and that upon this application the Railroad Commission made its order. This order was offered in evidence and is as follows:  
[66]

**[Order of Railroad Commission, August 13, 1912.]**

**BEFORE THE RAILROAD COMMISSION OF  
THE STATE OF CALIFORNIA.**

**Application No. 75.**

In the Matter of the Application of **SACRAMENTO VALLEY ELECTRIC RAILROAD COMPANY** for an Order Authorizing the Issuance of 30,000 Shares Preferred Stock Par Value \$3,000,000 and 7500 Shares Common Stock Par Value \$750,000.

**APPEARANCES.**

**A. C. HUSTON**, Representing Applicant.

**OPINION.**

**GORDON and EDGERTON**, Commissioners.

This is an application by the Sacramento Valley Electric Railroad Company for an order authorizing the issuance by applicant of 30,000 shares par value of \$3,000,000 preferred stock and 7,500 shares par value \$750,000 common stock, and authorizing applicant to sell said preferred stock at par and to pay commissions on the sale thereof of 20 per cent and authorizing the sale or exchange of said common stock for rights of way.

The articles of incorporation of applicant were filed on the 4th day of May, 1912, and thereunder applicant is empowered to build and operate a standard-gauge electric, steam or other motive-power



passenger and freight railroad through the following territory.

Commencing in the town of Red Bluff, State of California, and running thence in a general southerly direction through the counties of Tehama, Glenn, Colusa and Yolo to the City of Woodland, County of Yolo, State of California, a distance of 113 miles; thence in a general southeasterly direction through or near the town of Davisville in Yolo County, State of California, and the town of Dixon, County of Solano, State of California, to the most convenient [67] and practicable point of connection with the Oakland, Antioch and Eastern Railway in the County of Solano, State of California, a distance of 36 miles, an intermediate branch beginning in the Town of Colusa, State of California, and running thence in a general westerly direction through or near the Town of Williams in the said County of Colusa, connecting with the main line from the town of Red Bluff to the City of Woodland, a distance of 11 miles. The estimated length of said railroad, including all of its intermediate branches is 160 miles. The authorized capital stock of applicant is \$5,000,000, divided into 30,000 shares of preferred stock of the par value of \$100 per share, and 20,000 shares of common stock of the par value of \$100 per share. The holders of the preferred stock are entitled to receive when and as declared from the surplus profits arising from the business of the corporation yearly dividends at the rate of 6 per cent per annum, payable in monthly, quarterly or semi-annually install-

ments as the by-laws shall from time to time provide. Prior to July 1, 1915, the dividends on the preferred stock shall not be cumulative but until that date no dividends shall be paid or set apart upon the common stock in any year until a dividend at the rate of 6 per cent per annum in each year shall have been set apart upon the preferred stock. Commencing with the 1st day of July, 1915, the dividends on the preferred stock shall be cumulative and shall be declared and paid or set apart before any dividends on the common stock shall be paid or set apart so that if at any time dividends amounting to 6 per cent per annum shall not have been paid thereon or declared and set apart for all preceding dividend periods, the deficiency shall be declared and paid or set apart before any dividends shall be paid or set apart for the common stock. Whenever the cumulative dividends on the preferred [68] stock for all previous years shall have been declared and the accrued installments for the current year shall have been declared and shall have been paid or set apart and the corporation shall have paid such cumulative dividends for the previous years and such accrued installments, or shall have set aside from the surplus profits arising from its business a sufficient sum for the payment thereon, the board of directors may declare dividends on the common stock payable then or thereafter out of any remaining surplus profits to the amount of 4 per cent per annum. If after the declaration of 6 per cent dividends on the preferred stock and 4 per cent dividends on the common stock there remains any

surplus funds available for dividends, said surplus shall be equally divided between the holders of the preferred and common stock. In the event of any liquidation or dissolution or winding-up of the corporation, whether voluntary or involuntary, the holders of the preferred stock shall be entitled to be paid in full both par value of their issues and the unpaid cumulative dividends thereon, before any amount shall be paid to the holders of the common stock and after payments to the holders of the preferred stock of its par value and on unpaid accruing cumulative dividends thereon, the remaining assets and funds shall be divided and paid to the holders of the common stock according to their respective shares.

The board of directors have authority from time to time to set aside from the surplus profits arising from the business of said corporation such a sum as the board of directors may determine for working capital to be employed in the business of said corporation.

Sixteen hundred shares of the common stock, par value \$160,000 have been subscribed for and \$16,000 thereof has been paid in cash to the corporation.  
[69]

It is proposed by the incorporators of this company to build and operate an electric railroad through the territory named above. Three distinct routes have been surveyed as shown by the maps on file herein and applicant has not yet determined which of these three routes will be finally selected.

Applicant has had prepared and filed with the

Commission estimates, by engineers, of the cost of building this railroad with its branches along the three routes surveyed as aforesaid. These estimates show a cost, exclusive of rights of way, of \$4,708,200 for the so-called West Line; \$4,826,400 for the Middle Line; and \$5,106,200 for the East Line.

According to the testimony of Mr. Donohoe, president of the corporation, it is expected to realize approximately \$1,500,000 on the sale of preferred stock and later float a bond issue for \$3,500,000 additional to complete the building of the road.

Applicant requests that it be allowed to sell the preferred stock on installments of \$25 cash and balance in equal installments in 3, 6 and 9 months, promissory notes to be given for the deferred payments. It is also requested that the entire 20 per cent, or \$20 on each share, be paid the salesman on receipt of the first cash payment of \$25.

The plan to raise a substantial part of the money necessary for the construction of this road through the sale of stock is commendable as the stock does not fasten upon the corporation fixed charges, a failure to meet which inevitably places the corporation in dire straits. It is to be regretted that many utility corporations in this state have seen fit to raise the entire amount of money invested in their enterprises through the sale of bonds, thus burdening the entire physical value of their properties with fixed charges and compelling those in control of the utility to [70] produce enough money regularly to meet these charges. This often results in the failure to



properly take care of depreciation and to keep the plant in first-class efficient condition, because of the necessity of squeezing the business to produce these inexorable fixed charges.

The proposal to pay 20 per cent commissions on the sale of stock, in our opinion, is not unwarranted, particularly in view of the fact that bonds are being sold on established utility corporations at this amount of discount. Of course, no commission should be paid on stock already subscribed for or sold without the services of a salesman. As to the time of his payment, however, we disagree with applicant in that we feel that his entire commission should not be taken from the first cash payment. First, because this only leaves \$5.00 out of this payment in the hands of the company, and, second, we feel that the salesman should share with the company the risk of a failure by the purchaser to make any more payments. Hence, we conclude that the commissions shall be paid in proportion as the purchase price is paid in, that is to say,—the salesman shall receive 20 per cent of each cash payment. The form of contract for the sale of stock should be submitted for the approval of the Commission.

In order that reasonable assurance be had that the actual construction of this road will not be entered upon before there is sufficient money in hand to warrant proceeding with the scheme, there should be \$750,000 paid in on stock before any construction work begins or any expense other than that incident to the sale of stock is incurred by the company, and

title to rights of way should be taken conditioned on the receipt by the company of the above amount of money.

In order that the Commission may assure itself at all [71] times that the money received from the sale of this stock is being properly and judicially expended for the purposes named, we recommend that in addition to a compliance with Order No. 24, applicant be ordered to submit to the Commission for its approval before the execution thereof, all general contracts exceeding the amount \$1000.

Subject to the foregoing conditions we recommend that the application be granted.

The following form of order is herewith submitted:

#### ORDER.

Application having been made to the Railroad Commission of the State of California by Sacramento Valley Electric Railroad Company for an order authorizing the issue by said company of 30,000 shares par value \$3,000,000 preferred stock and 7,500 shares par value \$750,000 common stock, and authorizing applicant to sell said preferred stock at par and to pay commissions on the sale thereof of 20 per cent and authorizing the sale or exchange of said common stock for rights of way.

And a hearing having been duly held and it appearing to the Commission that the money and property to be secured by the issue of said stock are necessary and reasonably required by said company for the purpose of procuring rights of way and constructing thereon the railroad as specified in said

application and exhibits attached thereto, and the purposes for which the proceeds of the issue of said stock are to be used are not in whole or in part reasonably chargeable to operating expenses or income.

IT IS HEREBY ORDERED that the Railroad Commission of the State of California does hereby authorize the issue by Sacramento Valley Electric Railroad Company of \$3,000,000 par value preferred stock and \$750,000 par value common stock. [72]

Said preferred stock to be sold to net not less than 80 per cent of its par value to the company, provided that said stock may be sold to be paid for in installments, said installments to be not less than \$25 cash at the time of sale and the balance in equal installments in not more than 3, 6 and 9 months thereafter. Promissory notes bearing interest at 6 per cent per annum may be taken for the deferred payments, the stock not to be delivered until fully paid for. Provided further, that if commissions be paid on the sale of said stock they shall not exceed an amount which will yield the aforesaid 80 per cent par value of said stock net to the company and said commissions shall be paid in proportion as the cash for said stock is received by the company. No commission shall be allowed or paid on the stock already subscribed for nor shall any commission be allowed or paid except for services actually rendered in the sale of stock.

Said common stock may be sold by the company under the conditions above set out for the sale of preferred stock or said common stock may be ex-

changed for rights of way over which said railroad is to be constructed and operated, such exchange to be made upon the basis of the fair market value of such rights of way and the par value of the common stock.

Provided that the exchange of common stock for rights of way shall not be finally consummated until \$750,000 on the sale of preferred stock shall have been paid in to the treasury of the company. Proper provision, however, may be made for the conditional acquiring of said rights of way in exchange for said common stock pending final consummation of such exchange. Construction of the road shall not be entered upon nor liability created, nor money paid out except for commissions as aforesaid until there shall be in the hands of the company from the sale of stock \$750,000. [73]

The proceeds from the sale of said preferred stock shall be used for the following purposes:

For the purchase of materials and rolling stock and the construction of an electric railroad in certain territory all as set out in detail in the application and exhibits attached thereto and filed therewith.

Said company shall keep separate, true and accurate accounts showing the receipt and application in detail of the proceeds of the sale or exchange of said stock hereby authorized to be issued and on or before the 25th day of each month the company shall make a verified report to the Commission in accordance with the Commission's General Order No. 24, stating the sale or disposal of such stocks during preceding month, the terms and conditions of such



sale or other disposition, the moneys or property realized therefrom and the use and application of such money or property. And in addition thereto said company shall submit to this Commission for its approval the form of all contracts for the sale or exchange of stock and before the execution thereof all contracts for grading, bridging, track, including materials and labor, equipments of all kinds and all materials, labor and property involving costs in excess of \$1000.

The authority hereby given to issue such stock shall apply only to stock issued by said company on or before the 1st day of August, 1913.

The foregoing opinion and order are hereby approved and ordered filed as the opinion and order of the Railroad Commission of the State of California.

Dated at San Francisco, California, this 13th day of August, 1912.

JOHN M. ESHLEMAN,  
H. D. LOVELAND,  
ALEX GORDON,  
E. O. EDGERTON,

Commissioners.

[Seal]

H. C. MATHEWSON,  
Assistant Secretary, [74]

That following this order and previous to the negotiations with Mr. Aston another application had been made to the Commission, that this application was pending at the time of the negotiations with Mr. Aston and that upon this application the commission made its order, on September 27, 1913. This order was offered in evidence and is, as follows: [75]

**[Order of Railroad Commission, September 27, 1913.]**

Decision No. 971.

**BEFORE THE RAILROAD COMMISSION OF  
THE STATE OF CALIFORNIA.**

Application No. 75.

In the Matter of the Application of SACRAMENTO VALLEY ELECTRIC RAILROAD COMPANY for an Order Modifying the Order of the Commission of Date August 13, 1912, Wherein the Said Company was Granted Permission to Sell and Issue 30,000 Shares of Preferred Stock and 7500 Shares of Common Stock.

EDGERTON, Commissioner.

**SUPPLEMENTAL OPINION.**

This is an application for a modification of the order made herein on the 13th day of August, 1912.

That order authorized the issuance and sale of preferred and common stock under conditions therein specified. Among said conditions, was the following:

“Said preferred stock to be sold to net not less than 80 per cent of its par value to the company, provided that said stock may be sold to be paid for in installments, said installments to be not less than \$25 cash at the time of sale and the balance in equal installments in not more than 3, 6, and 9 months thereafter. Promissory notes bearing interest at six per cent per annum may be taken for the deferred payments, the stock not to be delivered until fully paid

for. Provided further, that if commissions be paid on the sale of said stock they shall not exceed an amount which will yield the aforesaid 80 per cent par value of said stock not to the company and said commissions shall be paid in proportion as the cash for said stock is received by the company. No commission shall be allowed or paid on the stock already subscribed for nor shall any commission be allowed or paid except for services actually rendered in the sale of stock."

Said order also provided:

" . . . . Construction of the road shall not be entered upon nor liability created, nor money paid out except for commissions as aforesaid until there shall be in the hands of the company from the sale of stock \$750,000." [76]

Said order also provided:

"The authority hereby given to issue such stock shall apply only to stock issued by said company on or before the 1st day of August, 1913."

We are now asked to modify said order so as to permit the payment of general expenses incurred by said company other than commissions paid on the stock, notwithstanding it has not in its hands \$750,000 from the sale of stock, and to permit the taking of promissory notes for the entire price of the stock sold, and to extend the life of said order from August 1, 1913 to August 1, 1914.

It appears that up to August 31, 1913, this company has received \$416,401.55 on account of the sale

of its preferred stock, \$212,290.00 of which is cash and \$204,111.55 is represented by promissory notes, and that it has paid out in commissions on the sale of said capital stock, the sum of \$80,290.29, and for expenses in conducting the business of said corporation, the sum of \$40,468.42.

It was testified to at the hearing that through the activities of the officers and agents of the company 90 per cent of the necessary right of way over which this line of railroad is to be constructed, has been given free to the company.

Applicant has submitted a detailed statement of expenses already paid to August 31, 1913, and asks that it be authorized to expend for general expenses to be incurred by the company hereafter, an amount not to exceed \$3,000.00 per month.

An analysis of the expenses paid by this company other than commissions on the sale of stock, shows that they consist generally of office rent and expenses, clerical help, [77] stenographic services, advertising, expenses and salaries of right of way agents, expenses of its directors in traveling to and from meetings and the salaries of an auditor and an engineer.

I believe that it is necessary that this company maintain an office with the usual facilities and that it employ persons to obtain rights of way. (This, however, appears to be a diminishing necessity, as the testimony is that 90 per cent of the rights of way have already been obtained.) The need of an engineer at this time where no construction is under way is not so apparent. It appears that the money



already paid out for these purposes has been honestly expended for the benefit of the company.

Sufficient showing has not been made, however, to justify a continuing expense of \$3,000.00 per month. I believe that with the exercise of economy that the expenses can be brought down to \$1,000.00 per month, and in view of the fact that this company is not building its line, but is selling stock for the purpose of building up a treasury, the greatest economy should be practiced in order that the money received from the sale of stock be available for the construction of the railroad.

Inasmuch as the directors of this company are familiar with men and conditions in the Sacramento Valley where this railroad is to be built, and where the stock is being sold, I believe it is reasonable to permit this company to take promissory notes for the sale of its stock, provided that these notes be passed upon and approved by the directors before acceptance, and that sufficient cash be realized upon said notes, without obligating the company to repay said money in the event that said promissory notes are not paid, to pay [78] all commissions of stock salesmen and the expenses of said company. This will retain intact the cash now held by this company. All promissory notes taken by salesmen should be at once delivered to the directors of the company to be passed upon and in the event of their being disapproved, to be immediately returned to the maker.

I submit herewith the following form of supplemental order:

## SUPPLEMENTAL ORDER.

Application having been made to the Railroad Commission of the State of California by Sacramento Valley Electric Railroad Company for an order modifying and amending the order made herein on the 13th day of August, 1912, in the particulars set out in the foregoing opinion, and a public hearing having been held, and it appearing to the Commission that said application should be granted under the conditions in this order set out.

IT IS HEREBY ORDERED by the Railroad Commission of the State of California that the order heretofore made by this Commission herein, dated August 13, 1912, is hereby amended and modified so as to read as follows:—

## ORDER.

Application having been made to the Railroad Commission of the State of California by Sacramento Valley Electric Railroad Company for an order authorizing the issue by said company of 30,000 shares par value \$3,000,000 preferred stock and 7,500 shares par value \$750,000 common stock, and authorizing applicant to sell said preferred stock at par and to pay commissions on the sale thereof of 20 per cent and authorizing the sale or exchange of said common stock for rights of way. [79]

And a hearing having been duly held and it appearing to the Commission that the money and property to be secured by the issue of said stock are necessary and reasonably required by said company for the purpose of procuring rights of way and constructing thereon the railroad as specified in said ap-

plication and exhibits attached thereto, and the purpose for which the proceeds of the issue of said stock are to be used are not in whole or in part reasonably chargeable to operating expenses or income.

IT IS HEREBY ORDERED that the Railroad Commission of the State of California does hereby authorize the issue by Sacramento Valley Electric Railroad Company of \$3,000,000 par value preferred stock and \$750,000 par value common stock.

Said preferred stock to be sold to net not less than 80 per cent of its par value to the company, provided, that said stock may be sold to be paid for in installments, said installments to be not less than \$25.00 cash per share at the time of sale, and the balance in equal installments, payable in not more than 3, 6, and 9 months thereafter. Promissory notes bearing interest at not less than six per cent per annum may be taken for the deferred payments. Provided further, that promissory notes bearing interest at not less than six per cent per annum and payable at not more than one year from their date, may be taken for the whole purchase price of said stock, but sufficient money shall be realized from such promissory notes, without obligating the company to repay the same, to pay all commissions paid on the sale of said stock, and in addition, the general expenses herein allowed to be paid by the company. Provided further, that if commissions be paid on the sale of stock they shall not exceed an amount which will yield the aforesaid 80 per cent of the par value of said stock net to the company. Commissions shall be allowed or paid only [80]

for services actually rendered in the sale of stock.

None of the said stock shall be delivered until fully paid for. All promissory notes taken for the above purposes shall be delivered immediately to the board of directors of the company to be approved or disapproved by said board. Where said promissory notes are approved a record of such approval shall be made and kept by said directors, and where said promissory notes are disapproved, the same shall be returned immediately to the makers.

Said common stock may be sold by the company under the conditions above set out for the sale of preferred stock or said common stock may be exchanged for rights of way over which said railroad is to be constructed and operated, such exchange to be made upon the basis of the fair market value of such rights of way and the par value of the common stock.

Provided that the exchange of common stock for rights of way shall not be finally consummated until \$750,000 on the sale of preferred stock shall have been paid into the treasury of the company. Proper provision, however, may be made for the conditional acquiring of said rights of way in exchange for said common stock pending final consummation of such exchange. Construction of the road shall not be entered upon nor liability created, nor money paid out except for commissions as aforesaid until there shall be in the hands of the company from the sale of stock \$750,000.

The proceeds from the sale of said preferred stock shall be used for the following purposes:



For the purchase of materials and rolling stock and the construction of an electric railroad in certain territory all as set out in detail in the application and exhibits attached thereto and filed therewith. [81]

Said company is hereby authorized to pay for general expenses, exclusive of commissions paid on the sale of stock, as set out in detail in the statements filed with this Commission, covering the period up to August 31, 1913, an amount equal to \$40,468.42. Said company shall submit for the approval of this Commission a statement similar in form to the one just above mentioned, showing general expenses incurred from said August 31, 1912, to the date of this order. From and after the date of this order, and until the further order of this Commission, said company is authorized to expend for general expenses, similar to those detailed in the statements heretofore made, and just above referred to, an amount not to exceed \$1,000.00 per month, provided that said \$1,000.00 shall not be taken from cash now in the hands of applicant, but shall be realized from promissory notes hereafter taken for the sale of stock.

Said company shall keep separate, true and accurate accounts showing the receipt and application in detail of the proceeds of the sale or exchange of said stock hereby authorized to be issued and on or before the 25th day of each month the company shall make a verified report to the Commission in accordance with the Commission's General Order No. 24, stating the sale or disposal of such stocks during

the preceding month, the terms and conditions of such sale or other disposition, the moneys or property realized therefrom and the use and application of such money or property. And in addition thereto said company shall submit to this Commission for its approval the form of all contracts for the sale or exchange of stock and before the execution [82] thereof all contracts for grading, bridging, track, including materials and labor, equipment of all kinds and all materials, labor and property involving costs in excess of \$1,000.00.

The authority hereby given to issue such stock shall apply only to stock issued by said company within the time from the 1st day of August, 1913, to the 1st day of August, 1914.

The foregoing opinion and order are hereby approved and ordered filed as the opinion and order of the Railroad Commission of the State of California of the State of California.

Dated at San Francisco, California, this 27th day of September, 1913.

JOHN M. ESHLEMAN,  
ALEX GORDON,  
MAX THELEN,  
EDWIN O. EDGERTON,  
Commissioners.

A true copy.

[Seal]

H. C. MATHEWSON,  
Assistant Secretary Railroad Commission, State of  
California. [83]

The following occurred during the examination of the witness, Huston, pp. 103, 106:

(Testimony of A. C. Huston.)

“Q. When was the first order made modifying the order of August 12, 1912?

A. September 27, 1913, was the first formal order.

The COURT.—Are you speaking now of the order of the Railroad Commission?

Mr. BLAKE.—Yes, sir. That order is in evidence.

Q. Has there been any other order since then?

A. I think so.

Q. What date, if you remember?

A. There is a subsequent order approving a lot of expenditures and authorizing the construction of the unit from the junction of the Oakland & Antioch at Rio in Solano County to the town of Dixon.

Q. I hand you here what purports to be a decision, No. 1172, reports of decisions of the Railroad Commission of California, and ask you to identify that as being the subsequent order modifying the order of August 12 and of September 27.

A. I will answer that by saying yes, with this qualification: We frequently went to the Railroad Commission with informal applications authorizing certain expenditures; whether any of them intervened between the September 27th order and this one, I cannot say, but so far as I remember now this is the next order of any importance.

Q. With reference to your going to the Railroad Commission for authority to make payments and to disburse money, did you do that after the contract upon which the payments were made had been entered into and performed in any cases?

(Testimony of A. C. Huston.)

Mr. CLARK.—I object to that as immaterial.

The COURT.—Objection overruled. [84]

A. In some instances, the Railroad Commission was consulted.

Mr. BLAKE.—Q. How consulted?

A. An informal consultation; the matter was discussed with Commissioner Edgerton and his views ascertained; I cannot recall now of our having made any contract previous to having obtained authority from the Commission.

Q. Authority in that way?

A. I don't recall any contract that we entered into that was required to go to the Commission unless we first had its consent.

The COURT.—Q. He is not talking about contracts, he is talking about expenditures, incidental expenses and things of that kind.

A. After the order of August 12th—in its terms, it did not authorize, as we thought, the expenditures of our money for current expenses; the matter was taken up by some members of the board with Mr. Edgerton, and he told them to proceed and he would ratify it afterwards.

Q. You understand, as a lawyer, that that would be entirely valueless; no one member of a board of that kind can give you any authority upon which you would be entitled to act. You might feel a moral assurance that by reason of his suggestion to you that the Commission would thereafter approve of what you had done, it would be a ratification afterwards, and not a previous authority?



(Testimony of A. C. Huston.)

A. That was the exact situation.

Q. Then you did make expenditures without the formal authority of the Railroad Commission?

A. We paid our office expenses.

Q. Had you no preliminary surveys, or anything of that kind?

A. The preliminary surveys were made before the company was incorporated; subsequent to the incorporation of the company [85] we had some additional surveys made, one, I believe, to Rio Vista, and one from Woodland to Dixon, under the express authority of the Commission.

Mr. BLAKE.—Q. I call your attention to the order contained in Volume I, Opinions and Orders of the Railroad Commission of California, at page 393, and under the designation in black type “Order” I wish you would point out to the Court what authority was actually granted to you under that order with reference to expenditures.

The COURT.—I don’t know that he need to point that out. If it is read, I suppose I can pass on it myself.

Mr. BLAKE.—I am not very familiar with its terms, myself. I believe he could pick it out quicker than I could..

The COURT.—If you want to ask his construction of it, that might be of aid to me.

Mr. BLAKE.—Q. Will you explain what the limitation upon your authority was by that order, as you construe it.

A. The first limitation of any particular conse-

(Testimony of A. C. Huston.)

quence as far as these matters are concerned, appears on page 394:

“Construction of the road shall not be entered upon nor liability created nor money paid out except for commissions as aforesaid until there shall be in the hands of the company from the sale of stock \$750,000; the proceeds from the sale of said preferred stock shall be used for the following purposes: For the purchase of materials and rolling-stock and the construction of an electric railroad in certain territory all as set out in detail in the application and exhibits attached thereto.”

My first impression and construction of that order was that so far as current expenses were incurred, we had the [86] *the* implied right to it.

The COURT.—I think your construction was correct.

A. (Continuing.) And pursuant to that construction of this order, we filed, in accordance with the rules of the Commission, a monthly statement showing our disbursements. Subsequently the question arose, and Mr. Edgerton suggested that the question could be eliminated by a formal order—

The COURT.—I think your construction is correct.

\* \* \* \* \*

The COURT.—Q. Mr. Huston, how long were you a member of the board of directors of this corporation?

A. I could not say; I came in some time—a year or so.

(Testimony of A. C. Huston.)

Q. And you were a director at the time of this transaction in suit here, were you?     A. Yes, sir.

Q. The members of the board of directors had always had free access to the records and files and correspondence of the company, had they not, if they demanded them?

A. I suppose so. It never was demanded, it never was denied.

Q. Don't the directors pay any attention to what is going on in the company?

A. In this particular matter, we depended upon Mr. Donohoe, who was down here all the time to keep us acquainted in all these matters, and when we met he usually came in with what was supposed to be a full report.

Q. But Mr. Donohoe's course had caused a division of sentiment in the board at that time?

A. Not with respect to keeping anything away from us; we supposed he was keeping us fully informed, and we were surprised to learn he had not.

[87]

Q. How do you ascribe to this transaction any peculiar characteristics that Mr. Donohoe should wish to keep them absolutely away from the other members of the board?

A. I can explain that to you: These matters came before the board of directors as to the stock bonus, and Mr. Reith and myself always opposed them for reasons we have stated. Mr. Donohoe figured that after the meeting of September 20th, if he brought this matter back to the board of directors to ap-

(Testimony of A. C. Huston.)

prove the payment of \$3,500 to Mr. Aston, that the board would not vote it through without the previous authority of the Railroad Commission.

Q. You are merely drawing on your surmises, not on anything that was said.

A. I have information from other members of the board.

Q. What was that information?

A. Well, as I understand from Mr. Manor, at the time they signed the contract of September 22d, he stated at that time that there is no use to put this proposition up to the board of directors, that Reith would kill it.

Q. I am asking you these questions, Mr. Huston, because as one somewhat acquainted with the practical working of institutions of this kind, and with some experience in their workings, it is very difficult for me to draw on my credulity sufficiently to believe that the board of directors did not know something of this transaction. That is not with any disposition to question your particular want of knowledge, because you were located in Woodland, and perhaps being an attorney, you did not deem it your part to look into this thing until it became a question of legal importance; but as you will readily understand as a man of business, it is a very difficult thing for one who knows anything about these things to believe that a transaction of this [88] kind could have been carried along for the period of time for which this ran without the members of the board of directors knowing more than you say they did know about it.



(Testimony of A. C. Huston.)

A. I quite agree with your Honor, and I want to add this, as long as your Honor suggested the matter: We only had two lines of business pending with our company at that time, we were doing no construction work; one was the sale of stock under the order of the Railroad Commission and the approval of notes; the other was the financing of the road. All of these persons attempted to finance the road; we thought it best to deal with one man. None of the directors lived in San Francisco. Mr. Donohoe spent a good deal of his time down here, and we left all negotiations with Mr. Donohoe, and when he would get these propositions and would get them up in shape, he would send us a message and we would come down and discuss them in the board one way or the other, and then reach whatever determination we thought best. In that way, we figured—these matters were largely left to Mr. Donohoe; I would say this, that practically all—in fact all these matters were left to Mr. Donohoe, and with these exceptions—well, during all the time we assumed we were getting all the information. Mr. Donohoe—commencing probably in the early summer of 1913, at a time when he was entertaining a proposition for Mr. Helm and when Mr. Reith and the rest of us would not stand for it because they wanted too much stock, it was from that time on that—

I want to add this, that Mr. Donohoe stated always at all sessions of the board, 'I will never make any

contract until I submit it to the board and we all agree on it.' '' [89]

That another and further supplemental order to the foregoing relative to the defendant company, made by said Railroad Commission on the 30th day of December, 1913, was received in evidence and is as follows:

**[Order of Railroad Commission, December 30, 1913.]**

APPLICATION No. 75.

Decided December 30, 1913.

Supplemental order, authorizing applicant (1) to issue certain preferred stock of the par value of \$3,159.55, in payment of expenses previously incurred; (2) to construct the first unit of its line from Dixon to a point of connection with the Oakland, Antioch and Eastern Railway; (3) increasing applicant's monthly allowance for current expenses from \$1,000.00 to \$1,250.00 per month.

Arthur C. Huston, for Applicant [90]

In the supplemental order of September 27, 1913, applicant was ordered to file a detailed statement of unpaid obligations not included in the statement of expenses covering the period up to August 31, 1913. Such detailed statement has now been made, showing a total of \$1,647.49, and request is made that the amounts therein contained be allowed to be paid. An examination of these items shows that they are proper items of expense, and therefore should be allowed.

Prior to and for a time after the incorporation of applicant, certain men were active in the promotion of the railroad project for which applicant was in-

corporated. During such activity they expended, on behalf of the project, various sums, totaling \$3,159.55, which they now ask this Commission to allow applicant to pay in par of preferred stock.

It is evident that these men did expend from their own resources the amounts named, and the evidence shows that the board of directors of applicant has allowed these various sums as constituting obligations in favor of these men. Therefore, I think this request should be granted and applicant be authorized to issue preferred stock at par in settlement.

Application is now made to permit the building of one unit of electric railroad,  $121\frac{1}{2}$  miles in length, between the town of Dixon, Solano County, California, and a connection with the Oakland, Antioch and Eastern Railway due south of Dixon.

The original order herein contained the following provision:

“Construction of the railroad shall not be entered upon, nor liability created, nor money paid out, except for commissions as aforesaid until there shall be in the hands of the company from the sale of stock \$750,000.”

The evidence shows that on December 1st there was in the hands of applicant from the sale of stock, \$93,144, and [91] *and* not to exceed \$1,000.00 has been expended since; and approved bankable promissory notes of the face value of \$211,261.55. Application is now made to modify the original order herein so as to permit the building at this time of the unit of road above mentioned, notwithstanding that there is not in the hands of applicant from the sale

of stock \$750,000.00. The estimate of cost for the construction of this unit is as follows:

Grading, 115,500 cubic yards	
at.....	\$23,100.00
Trestles, 450 lineal feet at \$12 ..	5,400.00
Culverts, 1,200 lineal feet at \$3..	3,600.00
Track construction, 121½ miles at	
\$10,600.....	132,300.00
Road crossings, 15 miles at \$100.	1,500.00
Fence, 13 miles at \$300.....	3,900.00
Overhead, 121½ miles at \$3,000.	37,500.00

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\$207,300.00

Contingencies, engineering, gen-	
eral expenses, etc., 10 per	
cent.....	20,700.00

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\$228,000.00

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Equipment, 2 motors and 1 trailer..	37,000.00
	\$265,000.00

The last item of equipment—two motors and one trailer, \$37,000.00, may be eliminated by reason of an arrangement with an existing road, whereby the equipment of the latter will be used in operation over this unit.

The evidence shows that this unit will run through a well-settled community, and that with the possibilities for freight and passenger traffic there is a reasonable probability of the successful operation of this unit, especially if favorable traffic arrangement can be made with the railroad with which it con-



nects. Applicant's officers state that they propose to have a definite, binding arrangement by which they can dispose of the \$211,261.55 of notes now on hand before the entering into of any contract for the construction of this road so that with the cash now on hand and the cash to be received from these [92] notes there will be no question of the ability to pay for the construction work as it proceeds.

The cash now in the hands of applicant is drawing no interest and in view of the fact that the unit of road to be constructed can be operated before the completion of this whole railroad project, I believe this application should be granted.

Applicant has secured contracts for all of the rights of way of this 12½ miles of road, except 2 miles thereof, and the testimony shows that the balance of this right of way will be acquired at a cost not to exceed \$3,000.00.

Applicant requests permission to expend the following:

For surveying located line between the town of Dixon south to connection with the Oakland, Antioch and Eastern Railway..	\$700.00
For a similar survey from Dixon to Woodland.....	1,300.00
For standard plans for road, track, trestles, culverts, fences, overhead construction, etc., specifications to be used with contracts for grading, trestles, culverts, overhead fences, ties and rail..	500.00

It appears that the foregoing items are proper to be expended for the services and data to be obtained therefor, and I recommend that they be allowed.

I submit herewith the following form of order:

## SECOND SUPPLEMENTAL ORDER.

Application having been made by Sacramento Valley Electric Railroad Company for an order modifying the orders heretofore made herein, in certain particulars, and a hearing been had and it appearing to the Commission that said application should be granted,

IT IS HEREBY ORDERED, that the orders heretofore made herein are modified to the following extent:

Sacramento Valley Electric Railroad Company is hereby authorized to pay off and discharge those certain items of indebtedness [93] as shown in detail on page 4 of the application filed with this Commission on October 27, 1913, and to expend for current expenses a sum not to exceed \$1,250.00 per month, provided that said expenses shall be paid from the proceeds of any notes in the possession of applicant, and to make in addition the following expenditures:

1. For surveying located line from the town of Dixon south to connection with the Oakland, Antioch and Eastern Railway, \$700.00;

2. For a similar survey between the towns of Dixon and Woodland, \$1,300.00;

3. For standard plans for road, track, trestles, culverts, fences, overhead construction, etc., speci-

cations to be used for grading, trestles, culverts, overhead fences, ties and rails, \$500.00.

Applicant is hereby further authorized to construct its road between the town of Dixon due south to a connection with the Oakland, Antioch and Eastern Railway, at a cost not to exceed the following estimate:

Grading, 115,500 cubic yards	
at 20 cents.....	\$23,100.00
Trestles, 450 lineal feet at \$12..	5,400.00
Culverts, 1,200 lineal feet at \$3,	3,600.00
Track construction, 121½ miles	
at \$10,600.....	132,300.00
Road crossings, 15 miles at	
\$100.....	1,500.00
Fence, 13 miles at \$300.....	3,900.00
Overhead, 121½ miles at \$3,000.	37,500.00
	<hr/>
	\$207,300.00
Contingencies, engineering,	
general expenses, etc., 10 per	
cent.....	20,700.00
	<hr/>
	\$228,000.00
Equipment, 2 motors and 1	
trailer .....	37,000.00
	<hr/>
	\$265,000.00

Provided, however, that before entering into any contract of \$1,000.00 or more, for the construction of said road or [94] for the acquisition of materials or service therefore, such contract shall be

submitted to and obtain the approval of this Commission.

Sacramento Valley Electric Railroad is further authorized to issue preferred stock at par to the following persons in the amount set opposite their names, to wit:

C. L. Donohoe, president, to Sept. 30, 1912.....	\$1,287.15
C. L. Donohoe, president, October, 1912.....	129.00
L. P. Klemmer, director, from June 11, 1911, to November, 1912.....	207.90
H. W. Manor, vice-president....	190.00
J. Reith, Jr., treasurer, from April, 1911, to September, 1912.....	665.05
E. L. Sisson, secretary, from April, 1912, to September, 1912.....	425.50
A. C. Huston, attorney, from April, 1911, to September, 1912.	254.75

Provided, that immediately upon the issue of such stock said persons shall give to said company receipts in full for the above amounts. Except in the particulars herein in this order named, all existing orders herein shall remain in full force and effect.

The foregoing second supplemental opinion and order are hereby approved and ordered filed as the second supplemental opinion and order of the Railroad Commission of the State of California.

Dated at San Francisco, California, this 30th day of December, 1913. [95]

The evidence showed the foregoing were the only



orders made by said Railroad Commission relating to the issuance of its stock by defendant or the use of the proceeds thereof.

A. C. Huston further testified on his cross-examination:

“Mr. BLAKE.—Q. At the time that this order was made, their (referring to the company, defendant) only source of income from any quarter was the sale of this stock?

A. That was the only source of income we (referring to the company, defendant) have ever had.”

A. C. Huston further testified on his redirect examination:

“Mr. CLARK.—Q. Some reference was made to a sum of \$750,000 in the treasury before the company could proceed to do certain work or incur certain obligations; was that \$750,000 in the treasury from the source designated in the Commission’s order?

A. We never have had that amount at any time.”

Judgment was entered herein on May 10, 1915.

**[Order Settling and Allowing Bill of Exceptions.]**

WHEREUPON, the Court, being willing that a record of the proceedings should be made in said cause, in order that the same may be reviewed for errors, if any there be, now hereby certifies that the foregoing bill of exceptions contains all of the evidence in the cause relating to the question presented by the exceptions noted by the defendant, the defendant making no point that the evidence is insufficient to sustain the finding that the contract relied on was entered into and breached as pleaded in the complaint in the first count, but claiming and

reserving the point that the contract was illegal and not authorized by the order of the Railroad Commission, and said bill of exceptions is full, true and correct; the Court further certifies [96] that the said bill of exceptions was presented within the time allowed by this Court and by law, for the filing and presentation of the same, and said bill of exceptions is hereby settled and allowed.

Dated, September 21st, 1915.

WM. C. VAN FLEET,  
Judge.

**[Stipulation as to Bill of Exceptions.]**

The foregoing bill of exceptions is correct and it is agreed the same may be settled and allowed in accordance with the certificate thereto attached.

BLACK & CLARK,  
A. C. HUSTON,  
Attys. for Plff. in Error.  
JACOB M. BLAKE,  
Atty. for Deft. in Error. [97]

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[Title of Court and Cause.]

**Assignment of Errors.**

The defendant in this action, in connection with its petition for writ of error, makes the following assignment of errors, which he avers occurred on the trial of this action:

1. The Court erred in refusing to determine and find that defendant could expend its funds for only such purposes as were directed or permitted by the orders of the Railroad Commission of the State of

California; that, at a time alleged in the complaint, defendant did not have legal authority and was not authorized to make the contract alleged in the complaint or to employ plaintiff to render services or to agree to pay him the sums alleged in the complaint; and that, under and by virtue of the orders of the said Railroad Commission controlling the disbursement and expenditure of the funds of defendant, its funds could not be legally applied in payment of the obligations mentioned in the complaint and that the plaintiff was not entitled to recover for said reasons. [99]

2. The Court erred in its refusal to find and determine said matters and the Court erred in its refusal to determine for said reasons that the plaintiff was not entitled to recover in this action.

3. The Court erred in determining that the plaintiff was entitled to any judgment.

4. The Court erred in refusing to find and determine that, under and by virtue of the laws of the State of California, defendant was, at all times mentioned in the complaint, and ever since has been, and now is, under the jurisdiction of the Railroad Commission of the State of California, to the extent that it was, and is, only authorized to enter into such contracts for the expenditure of its funds and to make only such expenditure from its funds as were, and are, directed, permitted, or authorized by the said Railroad Commission of said state.

5. The Court erred in refusing to find and determine that, at all times alleged in plaintiff's complaint, defendant was not authorized and did not

have the legal authority or any capacity, right or power to make or enter into the alleged contract with plaintiff or to employ plaintiff to render the alleged services or to pay plaintiff any of the sums mentioned in plaintiff's complaint.

6. The Court erred in refusing to find and determine that, under and by virtue of the orders of the Railroad Commission of the State of California governing and controlling the disbursement and expenditure of the funds of defendant, none of said funds could be legally applied to the payment of the obligations alleged in the complaint. [100]

7. The Court erred in refusing to find and determine that it is true that defendant had no legal capacity or authority to make or enter into the contract alleged in the first cause of action or to make or enter into any of the agreements alleged in the complaint.

8. The Court erred in refusing to find and determine that plaintiff take nothing and that defendant is entitled to costs.

9. The Court erred in refusing to find and determine that, prior to August 13, 1912, the defendant made application to the Railroad Commission of the State of California, and that said Railroad Commission duly gave and made its order dated August 13, 1912, and which constitutes the Defendant's Exhibit "D."

10. The Court erred in refusing to find that said order last mentioned continued unmodified until the date of the order next mentioned.

11. The Court erred in refusing to find and deter-



mine that, prior to September 27, 1913, the defendant duly applied to the said Railroad Commission of the State of California for modification of said order of August 13, 1912, and that thereupon said Railroad Commission duly gave and made its order dated September 27, 1913, and which constitutes the Defendant's Exhibit "F."

12. The Court erred in refusing to find and determine that said two orders were the only orders of said Railroad Commission purporting to specify the liabilities which defendant might incur against its funds.

13. The Court erred in refusing to find and determine that said Railroad Commission made no other order relating to [101] the contract relied upon by plaintiff.

14. The Court erred in refusing to find and determine defendant never had in its hands, received from the sale of its stock, the sum of \$750,000, and that its only source of income was from the sale of its stock and that its funds constituted moneys received from the sale of its stock.

15. The Court erred in granting the judgment payable generally out of any properties of the defendant.

WHEREUPON, the defendant prays that the judgment of the District Court may be reversed.

A. C. HUSTON,  
BLACK & CLARK,  
Attorneys for Defendant.

[Endorsed]: Filed Jul. 7, 1915. W.B. Maling,  
Clerk. By J. A. Schaetzer, Deputy Clerk. [102]

**[Certificate of Clerk U. S. District Court to  
Transcript of Record.]**

*In the District Court of the United States for the  
Northern District of California, Second Division.*

No. 15,759.

TAGGART ASTON,

Plaintiff,

vs.

SACRAMENTO VALLEY ELECTRIC RAIL-  
ROAD COMPANY, a Corporation,

Defendant.

**CERTIFICATE OF CLERK U. S. DISTRICT  
COURT TO RECORD ON WRIT OF ERROR.**

I, Walter B. Maling, Clerk of the District Court of the United States of America, in and for the Northern District of California, do hereby certify that the foregoing one hundred five (105) pages, numbered from 1 to 105, inclusive, to be a full, true and correct copy of the record and proceedings in the above-entitled cause, as the same remains of record and on file in the office of the clerk of said court, and that the same constitute the return to the annexed writ of error.

I further certify that the cost of the foregoing return to writ of error is \$60.00; that said amount was paid by Black & Clark, Esqrs., attorneys for the defendant, and that the original writ of error and citation issued in said cause are hereto annexed.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 27th day of October, A. D. 1915.

[Seal]                      WALTER B. MALING,  
Clerk of the District Court of the United States, for  
the Northern District of California.

[Ten-cent Internal Revenue Stamp. Canceled Oct.  
28, 1915. W. B. M.]      [106]

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[Endorsed]: No. 2670. United States Circuit Court of Appeals for the Ninth Circuit. Sacramento Valley Electric Railroad Company, a Corporation, Plaintiff in Error, vs. Taggart Aston, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Northern District of California, Second Division.

Filed October 27, 1915.

F. D. MONCKTON,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Meredith Sawyer,  
Deputy Clerk.

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*In the United States Circuit Court of Appeals for the  
Ninth Circuit.*

No. 2670.

SACRAMENTO VALLEY ELECTRIC RAIL-  
ROAD COMPANY, a Corporation,  
Plaintiff in Error,  
vs.

TAGGART ASTON,

Defendant in Error.

**Stipulation Under Rule 23.**

IT IS STIPULATED that in the printing of the transcript and record on appeal in the above-entitled cause, the following need not be printed: 1. Title of court and cause throughout, except on the complaint and judgment. 2. Verifications and endorsements except date of the filing of the complaint, answer and writ of error. 3. Summons and return. 4. Stipulation waiving jury 5. Order that judgment be entered. 6. Clerk's certificate to judgment roll. 7. Petition for writ of error. 8. Order allowing writ of error. 9. Bond. 10. Writ of error. 11. Citation on writ of error. 12. Four orders enlarging time.

IT IS STIPULATED that all of said documents have been filed, and that if defendant in error at any time desires to raise any point with regard to any one of the same, the plaintiff in error will have printed a supplemental transcript showing the same.

DATED November 16, 1915.

BLACK & CLARK and

A. C. HUSTON,

Attorneys for Plaintiff in Error.

JACOB M. BLAKE,

Attorney for Defendant in Error.

[Endorsed]: No. 2670. In the U S. Circuit Court in the District Court of Appeals, 9th Circuit of the United States. Northern District of California. Sacramento Valley Elec. R. R. Co., Plff. in Error, vs. Taggart Aston, Dft. in Error. Stipulation Under Rule 23. Filed Nov. 19, 1915. F. D. Monckton, Clerk.





No. 2670

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

SACRAMENTO VALLEY ELECTRIC RAILROAD  
COMPANY (a corporation),

*Plaintiff in Error,*

VS.

TAGGART ASTON,

*Defendant in Error.*

BRIEF FOR PLAINTIFF IN ERROR.

Filed

MAR 10 1916

A. C. HUSTON, F. D. Monckton

BLACK & CLARK,

Clerk

*Attorneys for Plaintiff in Error.*

*Filed this.....day of March, 1916.*

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.



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VS.

TAGGART ASTON,

*Defendant in Error.*

## BRIEF FOR PLAINTIFF IN ERROR.

### Introduction.

The plaintiff, Taggart Aston, obtained judgment in the United States District Court for the Northern District of California, against the defendant, Sacramento Valley Electric Railroad Company, a corporation, for \$2350, for an alleged repudiation on October 1, 1913, of an alleged contract for services in getting up a report on the probable cost and earnings of a railroad defendant desired to build from Dixon in Solano County, to Red Bluff in Tehama County, California. The action was tried by the court. Defendant is here upon writ of error

complaining of the said judgment rendered by the trial court.

It was averred in the complaint that in addition to the services which plaintiff was to perform personally, he was to cause certain services to be performed by one, Wilsey, in presenting the proposition for the purchase of defendant's bonds to prospective purchasers in London and on the continent of Europe. The whole of the evidence in the cause revolved about a certain writing which was the basis of plaintiff's claim. This writing refers to Wilsey, although it does not state directly any obligation on plaintiff's part to have Wilsey perform services. The writing in question was as follows:

"San Francisco, Cal., Sept. 22, 1913.

Mr. Charles L. Donohoe,

President Sac. Valley Electric R. R. Co.,

San Francisco, California.

Dear Sir:

Relative to our conversation this morning I am prepared to start on gathering data and preparing a report at once of your railroad project. Terms to be—

\$ 3500 for complete report and data,

750.00 to be paid a week from to-day,

750.00 in two (2) weeks from next Monday,

500.00 two (2) weeks thereafter,

500.00 two (2) weeks after that time, pro-

vided the last \$500 is not to be paid

until my report is completed and

\$1000.00 on your hearing from Mr.

Wilsey, from London, that the matter

is receiving favorable consideration.

In the event of Mr. Wilsey reporting to you that the matter is not to go through, the last \$1000.00 is not to be paid.

I am prepared to give Mr. Wilsey preliminary data and report to take with him within the next week or so.

My report will be complete, showing the estimates of cost of construction in detail and possible traffic and returns for the road, based upon actual investigation in the field and examination of traffic conditions and possibilities of returns for your railroad and comparisons with the possible earnings of this road as compared with the known earnings of other similar roads in the Sacramento Valley. A copy of my report will be delivered to your company upon completion.

Of course you will give me every facility you may have for travelling in the Valley.

Yours very truly,

(Signed) TAGGART ASTON,  
Consulting Engineer.

The above approved.

(Signed) E. L. Sisson,

(Signed) H. W. MANOR,

(Signed) C. L. DONOHUE,

Directors."

On this document plaintiff had made the following entry:

"Sept. 22d Pd. \$150 on a/c and started work on report. (Signed) Taggart Aston (30)."

(Tr. p. 26.)

Finding 5 of the court was as follows:

"5. That on or about the 23d day of September, 1913, plaintiff entered upon the performance of his said contract with the defendant as aforesaid, and that thereafter and on or



about the 1st day of October, 1913, and without fault on the part of the plaintiff, and while plaintiff was engaged in the performance of his said contract, the defendant herein repudiated its said contract with the plaintiff, and refused to proceed further in the performance of said contract upon its part, and by and through its president, one Charles L. Donohue, *gave written notice to plaintiff to refrain from the preparation of said report*; that prior to the repudiation of said contract by the defendant as aforesaid, the defendant accepted the performance thereof on the part of the plaintiff herein as aforesaid, and paid the plaintiff on account of said contract the sum of one hundred fifty (150) dollars.”

(Tr. pp. 16, 17.)

It will not be contended that this finding meant that defendant accepted more than an act of performance on plaintiff's part. The very next finding—finding 6,—shows defendant's persistent refusal to accept performance of the alleged contract and its continuous repudiation of the alleged contract.

(Tr. p. 17.)

The court did not find that any sum was due, owing and unpaid to plaintiff for services performed under a contract. The first count of the complaint averred that the contract had been repudiated and that damages resulted in the sum of \$3350, and that \$150 had been paid on the contract. The second count *averred performance of services for defendant* upon a contract and that the services were of the reasonable value of \$3500, and that of the sum \$3350 was due. The second count was based

upon a *quantum meruit*. The first count of the complaint is not a count for moneys due, owing and unpaid. It is founded on repudiation of the alleged contract, and it is upon the first count that the judgment for \$2350 is based.

At the very time it is claimed the alleged contract was made, an order of the railroad commission of the State of California prohibited plaintiff from incurring any obligation in the construction of its road until it had \$750,000 paid in for stock, and the order further provided that when any contract for the purpose named which should involve the expenditure of over \$1000 should be made, it should be first submitted to the railroad commission for its approval. The statute creating the railroad commission prohibited all expenditures for purposes *not* specified in the commission's order. It prohibited expenditures for purposes specified in the commission's order *except on the conditions* therein named. *It expressly provided the commission might attach conditions to its order.* We respectfully contend that the trial court read an exception into the statute when by virtue of the express negation of the statute, such exception is impossible.

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### The Issues and the Ruling Complained of.

The case is not in any sense based upon full performance. *The court made no finding upon the count setting out the alleged reasonable value of*

*services rendered* (Tr. p. 4). The theory of the judgment is that plaintiff was entitled to these large damages because of an offer to perform. There is no evidence that could qualify the finding that within a week of the making the alleged contract, the defendant positively and *in writing* refused to accept performance. The alleged contract in no true sense was ever carried out. Not a particle of the character<sup>of</sup> investigation contemplated ever occurred. On October 1, 1913, the company through its president, Mr. Donohoe, wrote Mr. Aston that the company would not make what Donohoe regarded as a proposed contract. Donohoe had paid \$150 to Aston *out of his own pocket*. The company never acknowledged the debt. Negotiations were ended. If a contract ever was made, we earnestly urge that we have here nothing but the plain case of the prompt repudiation of an illegal contract for which damages are not recoverable.

Defendant pleaded and emphatically contended that it never made any contract whatsoever with plaintiff. It contended that it clearly and specifically called negotiations off before any contract was consummated, that the \$150 in question had not been paid except out of the president's funds. It contended that any such contract would have been illegal and in plain violation of the orders of the railroad commission of the State of California, and in plain violation of law in the absence of such orders. It pleaded that the alleged contract was illegal (Tr. pp. 12, 13). Upon the issue as to

whether there was an agreement, we are here foreclosed by the inferences and finding of the trial court against defendant, but upon the issue as to whether the court properly found and held the contract was lawful, we are sustained by oral and documentary evidence in which there is no conflict. Defendant specifically requested a favorable finding on this issue, and the request was denied and exception noted and allowed by the court (Tr. pp. 22, 23). The court found specifically to the contrary (findings 7, 8, 9 and 10, Tr. pp. 17, 18).

Our request was as follows:

“The defendant duly requested the court that it find and determine that defendant could expend its funds for only such purposes as were directed or permitted by the orders of the railroad commission of the State of California; that at the time alleged in the complaint defendant did not have legal authority and was not authorized in law to make the contract alleged in the complaint or to employ plaintiff to render services or to agree to pay him the sums alleged in the complaint; and that under and by virtue of the orders of the said railroad commission controlling the disbursement and expenditure of the funds of defendants, its funds could not be legally applied in payment of the obligations mentioned in the complaint and that the court should determine that plaintiff was not entitled to recover for said reasons. This request so made by the defendant was denied by the court, the defendant noting its exception, which was allowed by the court.”

(Tr. pp. 22, 23.)



This ruling is covered by assignment of error, as follows:

“1. The court erred in refusing to determine and find that defendant could expend its funds for only such purposes as were directed or permitted by the orders of the railroad commission of the State of California; that, at a time alleged in the complaint, defendant did not have legal authority and was not authorized to make the contract alleged in the complaint or to employ plaintiff to render services or to agree to pay him the sums alleged in the complaint; and that, under and by virtue of the orders of the said railroad commission controlling the disbursement and expenditure of the funds of defendant, its funds could not be legally applied in payment of the obligations mentioned in the complaint and that the plaintiff was not entitled to recover for said reasons.”

(Tr. pp. 90, 91.)

It was contended in the trial court that the statute relied upon, creating a railroad commission and defining its powers, could not and did not apply to this case. The learned trial court held the statute was inapplicable. We respectfully contend that this was error, that the statute in question plainly applied to this case, and that the statute and its restrictions and the restrictions that were created in pursuance of it, were entirely valid; that those restrictions applied just as clearly as they would have applied to a contract involving an expenditure of \$5000, which it was proposed should be made with one Wilsey for his expenses.

The findings made by the court in opposition to plaintiff's request are as follows:

"7. That it is not true, as alleged in the defendant's answer, that, under and by virtue of the laws of the State of California, or by any other law or laws, the defendant was at all the times mentioned in the complaint, or now is, under the jurisdiction of the Railroad Commission of California, to the extent that it was, or is, only authorized to enter into such contracts and to expend its funds for such purposes as were and are directed by the Railroad Commission of California.

8. That it is not true, as alleged in the defendant's answer, that, at all the times alleged in plaintiff's complaint, or at any other time, the defendant was not authorized, and did not have the legal authority, or any capacity, right or power to make or enter into any contract with the plaintiff, or to employ plaintiff to render any of said services, or to pay to the said plaintiff any of the sums alleged in plaintiff's complaint.

9. That it is not true, as alleged in the defendant's answer, that, under and by virtue of the orders of the Railroad Commission of the State of California governing and controlling the disbursement and expenditure of the funds of said defendant, none of said funds could be legally applied to the payment of said obligations alleged in plaintiff's complaint, or to any of them.

10. That it is not true, as alleged in the defendant's answer that the said defendant had no legal capacity or authority to make or enter into said contract, as alleged in the first cause of action in said complaint, or to make or enter into any of the agreements alleged in said complaint."

(Tr. pp. 17 and 18.)

### **The Statute of California Involved.**

The "Public Utilities Act" of California of 1911 applied to defendant. Defendant was incorporated as a public service railroad corporation. The court found it was "incorporated on May 4, 1912".

(Tr. p. 15.)

"It was admitted defendant was incorporated as a common carrier and was within such jurisdiction as the Railroad Commission of the State of California has over a state railroad corporation."

(Tr. p. 46.)

"A. C. Huston, counsel for defendant, testified, in substance: That he was one of the directors of the defendant, in September, 1913; that the board consisted of seven members; that, as attorney for the company, he had prepared the Articles of Incorporation, dated April 26, 1912;"

(Tr. p. 56.)

The act of the legislature of the State of California, known as the "Public Utilities Act", adopted December 23, 1911, and which, under the present referendum section (art. IV, sec. 1) of the state constitution, went into effect on March 23, 1912, created a railroad commission, and vested it with certain powers, among which was the supervision of the acts of the directors of a "public utility" in making use of the funds which the stockholders of the corporation might subscribe to build its road. The act was, therefore, unques-

tionably applicable to this case. In express terms it applied to a corporation such as the defendant.

Cal. Stats., Ex. Sess. of 1911, pp. 18, 34, 35.

We shall endeavor to show that it applied to the alleged act of the defendant here involved.

In examining the statute next mentioned and in viewing the orders of the railroad commission in question and the alleged contract in the light of that statute, we ask the court particularly to note:

1. That it permits an expenditure of the money paid into the corporation by the stockholders *only* in the event the railroad commission has made an order permitting the expenditure for the purpose intended.
2. That the order made may be upon *conditions* fixed by the commission.
3. *That if the order does not permit the expenditure the statute prohibited it.*

Section 52 of the Public Utilities Act in question contains the following provisions:

“Sec. 52. (a) The power of public utilities to issue stocks and stock certificates, and bonds, notes and other evidences of indebtedness and to create liens on their property situated within this state is a special privilege, the right of supervision, regulation, restriction and control of which is and shall continue to be vested in the state, and such power shall be exercised as provided by law and under such rules and regulations as the commission may prescribe.

\* \* \* \* \*



(b) A public utility may issue stocks and stock certificates and bonds, notes \* \* \*. Provided, that such public utility, in addition to the other requirements of law, shall first have secured from the commission an order authorizing such issue and stating the amount thereof and the purpose or purposes to which the issue of the proceeds thereof are to be applied, and that, in the opinion of the commission, the money, property or labor to be procured or paid for by such issue is reasonably required *for the purpose or purposes specified in the order*, and that, except as otherwise permitted in the order in the case of bonds, notes or other evidences of indebtedness, such purpose or purposes are not, in whole or in part, reasonably chargeable to operating expenses or to income. To enable it to determine whether it will issue such order, the commission shall hold a hearing and may make such additional inquiry or investigation, and examine such witnesses, books, papers, documents and contracts and require the filing of such data as it may deem of assistance. *The commission may by its order grant permission for the issue of such stocks or stock certificates, or bonds, notes or other evidences of indebtedness in the amount applied for, or in a lesser amount, or not at all, and may attach to the exercise of its permission such condition or conditions as it may deem reasonable and necessary.* The commission may authorize issues of bonds, notes or other evidences of indebtedness, less than, equivalent to or greater than the authorized or subscribed capital stock of a public utility corporation, and the provisions of sections 309 and 456 of the Civil Code of this state, in so far as they contain inhibitions against the creation by corporations of indebtedness, evidenced by bonds, notes or otherwise, in excess of their total authorized or subscribed capital stock

shall have no application to public utility corporations. *No public utility shall without the consent of the commission, apply the issue of any stock or stock certificate, or bond, note or other evidence of indebtedness, or any part thereof, or any proceeds thereof, to any purpose not specified in the commission's order, or to any purpose specified in the commission's order in excess of the amount authorized for such purpose, or issue or dispose of the same on any terms less favorable than those specified in such order, or a modification thereof.*

\* \* \* \* \*

(d) All stock and every stock certificate, and every bond, note or other evidence of indebtedness, of a public utility, issued without an order of the commission authorizing the same *then in effect* shall be void, and likewise all stock and every stock certificate, and every bond, note or other evidence of indebtedness, of a public utility, issued with the authorization of the commission, but not conforming in its provisions to the provisions, if any, which it is required by the order of authorization of the commission to contain, shall be void.

\* \* \* \* \*

(e) *Every public utility which, directly or indirectly, issues or causes to be issued any stock or stock certificate, or bond, note or other evidence of indebtedness, in non-conformity with the order of the commission authorizing the same, or contrary to the provisions of this act, or of the constitution of this state, or which applies the proceeds from the sale thereof, or any part thereof, to any purpose other than the purpose or purposes specified in the commission's order, as herein provided, or to any purpose specified in the commission's order in excess of the amount in said order authorized for such purpose, is subject to a penalty of not*

*less than five hundred dollars nor more than twenty thousand dollars for each offense.*

(f) Every officer, agent or employee of a public utility, *and every other person* \* \* \* who, *directly or indirectly*, knowingly applies, or causes or assists to be applied the proceeds or any part thereof, from the sale of any stock or stock certificate, or bond, note or other evidence of indebtedness, *to any purpose not specified* in the commission's order, or to any purpose specified in the commission's order, *in excess* of the amount authorized for such purpose, or who, with knowledge that any stock or stock certificate, or bond, note or other evidence of indebtedness, has been issued or executed in violation of any of the provisions of this act, negotiates, or causes the same to be negotiated, *shall be guilty of a felony."*

Cal. Stats., Ex. Sess. of 1911, pp. 45, 46, 47, 48.

Section 79 of the act also applies to individuals and makes criminal the act of *any person* who aids or abets any public utility in its non-compliance with or failure to comply with the statute.

Cal. Stats., Ex. Sess. of 1911, p. 62.

Section 81 of the act makes it a contempt for the public utility or *any person* to disobey the commission's order. This remedy is declared to be cumulative.

Cal. Stats., Ex. Sess. of 1911, p. 62.

The statute was passed under an amendment to the constitution, sec. 20 of art. XII, adopted on October 10, 1911, and its validity has been repeat-

edly recognized by the Supreme Court of the State of California since the decision in the case:

Pac. Tel. & Tel. Co. v. Eshleman, 166 Cal. 640.

But very recently, on January 29, 1916, the Supreme Court of California ruled that the provisions of section 52 of the statute which refer to section 309, Civil Code, are entirely effective; that the commission *may determine when a public utility shall incur debts in excess of its capital stock.*

Moss v. Smith, 51 Cal. Dec. 125.

The uncontradicted evidence showed that the alleged contract, if made, plainly contemplated the use of the funds of the defendant company which had been paid in by subscribers for stock; that \$750,000.00 had not been paid in for stock as required by the commission's order as a condition to incurring of any obligation, and that the alleged contract called for payment of over \$1000.00. The court in the progress of the trial intimated that it was implied in the commission's order that expenditures might be made. But, as we understand, the final position of the court was that the statute did not apply to the alleged contract. *If the order did imply certain expenditures should be made, it did not imply that contracts in excess of \$1000 could be made regardless of the order.* The alleged contract was not submitted to the commission as required by its order, and in that respect was in further violation of the order. It is the



funds paid in for stock which the state law holds in trust and permits to be expended only for the purposes specified in the commission's order. In language too plain for argument, this law denies the right to a public service corporation to use stock subscription money except under the commission's orders, and in terms equally plain it denies the right to any contractor to reach such funds unless there is the same sanction. The act not only penalizes any violation of the law, but it expressly prohibits the making of the expenditure except under the conditions named in the order. And it denounces the violation of its requirements as unlawful. It is not a case therefore where the court is called upon to determine whether from the fact a penalty is imposed it may or may not be implied that a contract made in violation of the statute is unlawful.

The Supreme Court of California, following the principles of the case of *Harris v. Runnels*, 53 U. S. 79; 13 L. ed. 901, laid down the law applicable to a prohibitory statute of the kind we are here dealing with as follows:

“It is of course undisputed that a contract in violation of a statute is void, and no difficulty can arise in such a case. More trouble has been experienced by the courts where the case has been one in which there has been no express prohibition of the act, but where a penalty for the performance or non-performance has been imposed. A statute may either expressly command, prohibit, or enjoin an act, or it may impliedly command, prohibit, or

enjoin it by fixing a penalty for the non-performance or commission thereof. As to the effect of such implied prohibitions there was much divergence of opinion upon the part of the English judges, and this difference of view found its way into conflicting and irreconcilable decisions of the courts of our different states. Thus in *Brown v. Duncan*, 10 B. & C. 93, the action was on a guaranty for sales of liquor, which had been distilled without a license under a statute requiring a license and affixing a penalty. It was held that these were mere revenue regulations, and that a breach did not render the trade so illegal as to prevent a recovery for sales. This case was distinguished from the case of *Law v. Hodgson*, 2 Camp. N. P. 147, which was an action for the value of bricks of dimensions smaller than that required by statute, which statute affixed a penalty for violation. The statute declared merely that bricks shall be made of such dimensions. Lord Ellenborough said: 'The first section of this statute absolutely forbids such bricks to be made for sale. Therefore, the plaintiff, in making the bricks in question, was guilty of an absolute breach of the law; and he shall not be permitted to maintain an action for their value.' The distinction declared in *Brown v. Duncan* was that the statute in *Law v. Hodgson* was designed to protect the public; while that in the case before them was a mere revenue regulation. The influence of these and other like decisions, appealing, as they have, with differing force to the judges of our state courts, has led to much confusion of decision; a confusion, however, which the learned decision of the supreme court of the United States in *Harris v. Runnells*, 53 U. S. 79, should do much to eliminate. *But it is to be noticed that every case from every court recognizes that when a statute*

*has been made for the protection of the public, a contract in violation of its provisions is void.* (Woods v. Armstrong, 54 Ala. 150, (25 Am. Rep. 671); Griffith v. Wells, 3 Denio, 226; Cope v. Rowlands, 2 Mees. & W. Rep. 149; United States Bank v. Owen, 27 U. S. 526; Burck v. Taylor, 152 U. S. 634 (14 Sup. Ct. 693); Miller v. Ammon, 145 U. S. 421, (12 Sup. Ct. 884); Berka v. Woodward, 125 Cal. 119; (73 Am. St. Rep. 71, 57 Pac. 777); Jackson v. Shaw, 29 Cal. 267; Johnson v. Simonton, 43 Cal. 242.)

\* \* \* \* \*

It has further been shown that where a statute, designed for the protection of the public, prescribes a penalty, that penalty is the equivalent of an express prohibition, and that a contract in violation of its provisions is void. 'Whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case.' (Coppell v. Hall, 74 U. S. 542; Berka v. Woodward, 125 Cal. 119, (73 Am. St. Rep. 31, 57 Pac. 777.)"

Levinson v. Boas, 150 Cal. 192, 193.

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### Detailed Statement of Facts.

Defendant company, as heretofore stated, was organized on May 4, 1912, for the purpose of constructing a railroad from Dixon, in Solano County, to Red Bluff, in Tehama County, California.

On May 3, 1912, the company applied to the railroad commission for permission to sell and make use of the proceeds of the sale of its stock.

Upon August 13, 1912, this application was acted upon.

(Tr. pp. 56, 57.)

On the date last named,—August 13, 1912,—the railroad commission made a certain order which was in force and which Aston knew was in force at the very time of the alleged contract of September 22, 1913. It is set out in the transcript and it plainly did not permit the alleged contract. It contained the following provisions:

*“Construction of the road shall not be entered upon nor liability created, nor money paid out except for commissions as aforesaid until there shall be in the hands of the company from the sale of stock \$750,000.*

*The proceeds from the sale of said preferred stock shall be used for the following purposes:*

*For the purchase of materials and rolling stock and the construction of an electric railroad in certain territory all as set out in detail in the application and exhibits attached thereto and filed therewith.*

Said company shall keep separate, true and accurate accounts showing the receipt and application in detail of the proceeds of the sale or exchange of said stock hereby authorized to be issued and on or before the 25th day of each month the company shall make a verified report to the commission in accordance with the commission's general order No. 24, stating the sale or disposal of such stocks during preceding month, the terms and conditions of such sale or other disposition, the moneys or property realized therefrom and the use and application of such money or property. *And in addition thereto said company shall submit to this commission for its approval the form*



*of all contracts for the sale or exchange of stock and before the execution thereof all contracts for grading, bridging, track, including materials and labor, equipments of all kinds and all materials, labor and property involving costs in excess of \$1000.*

The authority hereby given to issue such stock shall apply only to stock issued by said company on or before the 1st day of August, 1913."

(Tr. pp. 65, 66.)

The order was in no respect material to this case, modified by the later order of September 27, 1913, which went in evidence. That order was made upon an application to the commission made "*previous to the negotiations with Mr. Aston*".

(Tr. p. 66, bottom of page.)

This order contained the same restrictions as did the old.

(Tr. pp. 73, 74.)

It is simply impossible to read into these orders anything permitting the contract in question. *They did not permit any expenditures at all. They did not permit contracts in excess of \$1000 even if they did imply that expenditures could be made.*

The testimony relative to the company's finances aside from the recitals in the orders was as follows:

"A. C. Huston further testified on his cross-examination:

'MR. BLAKE. Q. At the time that this order was made, their (referring to the company, defendant) only source of income from any quarter was the sale of this stock?

A. That was the only source of income we (referring to the company, defendant) have ever had.'

A. C. Huston further testified on his redirect examination:

'MR. CLARK. Q. Some reference was made to a sum of \$750,000 in the treasury before the company could proceed to do certain work or incur certain obligations; was that \$750,000 in the treasury from the source designated in the commission's order?

A. We never have had that amount at any time.' "

(Tr. p. 90.)

The learned trial court found the contract was legal and gave an absolutely general judgment to the plaintiff. The alleged contract furnishes no support for such a judgment. The statute is plain. *The alleged contract intended the use of the proceeds of stock sales. There were no other moneys with which the payments could have been met.* If the statute can be read with an exception that will support this case, there is no certainty to the statute and the authority of the commission is indefinite and meaningless. If the law could be read as justifying payment for services fully performed, that, as we shall show, would furnish no legal ground for payment upon an illegal contract that has been repudiated.

The evidence, as appears from the testimony just quoted, was without conflict that the only funds with which defendant could have met the payments called for by the alleged contract were moneys

contributed by those who had subscribed for stock of the company. *The evidence showed without conflict that Aston knew the company had just been organized; that its railroad project was in a formative period; that no railroad had been built and that the company could not have earned a dollar with which to meet the payments of his alleged contract; he knew positively that if his contract was made, it contemplated it should be discharged out of money resulting from the sales of stock. He specifically understood no bonds had been sold and if bonds had been, the use of the money derived therefrom was subject to the same statutory restrictions as the use of money derived from sales of stock.*

Cal. Stats., Ex. Sess. of 1911, p. 46 (sec. 52).

We shall show the uncontradicted evidence as to Aston's knowledge; that he knew full well of the order of the railroad commission of August 13, 1912, at the time he claims his contract was made, and that he knew, through correspondence with which he was perfectly familiar, of the restrictions contained in that order.

He was associated with one Wilsey. Wilsey was a bond salesman. The company contemplated a bond issue. Wilsey came in contact with the company in August and September, 1913 (Tr. p. 23). Wilsey had gone over the line of the proposed railroad of the company with some of the directors of the company, and in the negotiations between

Wilsey and C. L. Donohoe, president of the company, Wilsey had specified two conditions to his undertaking to sell the company's bonds in Europe: First, that he should be paid \$5000 to cover the expense of his trip to Europe (this although he was going to Europe anyway); second, that plaintiff Aston should get up a report on the cost and probable earnings of the road for a figure not at the time stated. The proposition of paying the \$5000 was practically rejected. It never was submitted to the directors of the company. It was not agreed to. Aston knew of this before he ever presented the proposition involved in his alleged contract to the board of directors of the company; he knew that the company had said it could not, if it would, contract to pay the \$5000 without an order of the railroad commission, and that his associates, Wilsey, and Donohoe had both been of the opinion that if a bond sale contract were presented to the railroad commission others might defeat the sale of the bonds. Aston knew of these very matters when he first broached the proposition of his alleged contract to the directors of the company. He states he made his alleged contract with this knowledge; that he expected to share in the profits Wilsey might make and *that he expected through the payments made to him to meet the very demands Wilsey had made.*

The court will note the alleged contract is dated *September 22, 1913.*



On *September 15, 1913*, Donohoe wrote Wilsey as follows:

“San Francisco, September 15, 1913.

Mr. W. J. Wilsey,  
Palace Hotel,  
San Francisco, Calif.

Dear Sir:

Your communication, relative to financing of the railroad, received and seems satisfactory *except as to the advancing you expenses of your trip to Europe, not to exceed \$5000.*

The order I have from the railroad commission under date of August 13th, 1912, permitting us to proceed, provides:

**That we can not incur an indebtedness or make a contract for more than \$1,000.00 without obtaining the approval of the commission.**

In order to comply with your demand in this respect we would have to go to the commissioner and necessarily have a hearing on the matter, and it would have to be disclosed to whom the money was going and the purpose of the same, and that would become a public record and might possibly be disastrous to our plans. *In addition we would have to make a showing as to the probabilities and possibilities of your success in the matter.*

I had hoped that the commission of 2½% would be sufficiently large to justify you financing your own trip, and, necessarily, you must know now the possibilities of your success and from our conversation it would seem that you are not taking much chance in the matter.

I would like to hear from you on the subject.

(Signed) Your very truly,

CHARLES L. DONOHOE.”

(Tr. pp. 47, 48.)

In this letter Donohoe not only suggested the existence of the railroad commission, its authority and its order, but he in effect told both Mr. Wilsey and Mr. Aston that the stockholders' money could not be paid unless the commission was first satisfied the payment would not be useless. Would plaintiff contend a contract to pay the \$5000 would have been legal? This question has not been answered. What was the difference between Aston and Wilsey, between the demands of the one and the demand of the other?

On September 16, 1913, Donohoe wrote Wilsey a letter of similar import. It contained the following:

\* \* \* \* \*

“You are going to Europe anyway. In fact, I understood you to say that your arrangements have been made to leave here about the *25th* for New York, etc.

\* \* \* \* \*

You realize as stated in my letter of last evening, that it would be disastrous to our whole scheme for me to go to the commission for *an order authorizing this expense*, and there is no way to charge this item of expense without disclosing the real nature of it, and it would be a hazardous thing to do in any event. That of course you will readily understand. It would involve a public hearing which, under all conditions, must be avoided.

I will appreciate a frank and friendly letter from you on the subject at an early date.

Of course, I would be willing to guarantee to you the paying back of your expenses for your trip, not to exceed \$5000.00, in the event

that your mission in our behalf there should fail through any cause which originates with us.

Yours very truly,

(Signed) CHARLES L. DONOHUE,  
President."

(Tr. p. 50.)

In plain terms this letter states the expenditure was not authorized by the order of the railroad commission.

On September 18, 1913, Wilsey wrote Donohoe a letter, concluding as follows:

"I quite understand the difficulty with the railroad commission in California, but you people who are largely interested should not hesitate to gamble on such a splendid enterprise.

With my best wishes to you and your project, I am

Yours very truly,

(Signed) W. J. W."

(Tr. p. 51.)

This letter shows that Wilsey was entirely familiar with the fact that no contract could be made for a purpose not within the commission's order.

On the same date, September 18, 1913, Wilsey wrote Donohoe a letter containing the following:

*"You are quite right in not going before the railway commission. That must not be done in any event, but it seems to me that a small amount subscribed by each of you gentlemen interested would mean but little to you, to assist in putting the deal through, as no matter where you do this business, when it comes to*

be done you will have to meet this same question, and in a much larger degree, as any broker will have to work up his syndicate. I do no business with brokers, and my syndicates are already established beyond question.

*You say that you will be willing to guarantee the payment back to me of the amount named should I not be able to put the deal through," etc.*

(Tr. p. 53.)

It is entirely evident that Wilsey figured the arrangement made should be a *personal* one. Both he and Donohoe have spoken of a guarantee.

And the letter concluded as follows:

*"You should receive this letter on Saturday A.M., in time for your meeting, and I shall have to know at once so that I can spend the following week closing up matters. Would you do me the favor of writing me your final conclusion?"*

With esteem and friendship, I am

Yours truly,

(Signed) WILSEY."

(Tr. p. 54.)

It was on Saturday that Aston appeared before the board of directors. The letters were all written in San Francisco. But let us see how clearly he was aware of the very facts therein referred to. We quote from the record as follows:

*"The plaintiff testified that, for introducing Mr. Wilsey to the company, he understood he was to receive a share of the profits which Mr. Wilsey might receive, although there was no definite agreement as to the matter; that he*



met Mr. Wilsey at times at his hotel in San Francisco and was familiar with the position taken by the company in its letters to Mr. Wilsey."

(Tr. p. 56.)

"Q. Did you talk over with Mr. Wilsey the communications between Mr. Donohoe and Mr. Wilsey so as to keep conversant with their negotiations?

A. Naturally I would talk over any communications that had passed prior to that time."

(Tr. p. 45.)

"Q. Did you understand, before Mr. Wilsey went to Europe, that before this company would make any final contract with Mr. Wilsey for the disposition of its stock and bonds, it would be compelled to submit the proposition to the Railroad Commission?

A. It was understood that before any deal with any underwriters could be completed the terms of such underwriting would have to be submitted to the Railroad Commission.

Q. You understood that to apply to both the sale of stock and bonds of this company?

A. I understood that, yes, sir."

(Tr. p. 46.)

The plaintiff knew absolutely he had no right in the world to make the alleged contract.

The following additional testimony was given by plaintiff:

"The COURT. Q. But you were talking with Wilsey about the amounts required for his expenses; that had nothing to do with your contract?

A. *No; nothing to do with mine; I had not guaranteed—and I told Mr. Wilsey that inas-*

*much as the company said it was impossible under the railroad commission's ruling to pay that money, they could arrange the money in installments so they could pay it.*

Mr. CLARK. Q. Who said to you it was impossible under the Railroad Commission's orders?

A. I think Mr. Donohoe said it would be impossible to pay the large amount of \$5,000 to Mr. Wilsey; *he said it would be too large an amount unless they made an application to the railroad commission.*

The COURT. Mr. Aston, I don't understand you. Had you made a proposition to Mr. Wilsey that you would yourself pay him the installments that you received from the company?

A. I told Mr. Wilsey that I would hold myself responsible for the payment of the \$2500 to him."

(Tr. pp. 31, 32.)

On *Saturday, September 20, 1913*, and thereafter, according to plaintiff's testimony, the following occurred:

"\* \* \* he thereupon submitted, at the request of the directors at the time of the meeting, a written proposition, that the members of the board all stated the proposition was fair and that a committee would be appointed to arrange the details of the contract, that the meeting was on a Saturday and that, on the Monday following, September 22, 1913, Mr. Donohoe sent for him, and that he met Mr. Donohoe and two other directors, Mr. E. L. Sisson and Mr. H. W. Manor at the office of the company; that Mr. Donohoe stated that the terms submitted by plaintiff were very satisfactory to the board but that a change should be made so as to provide that the first pay-

ment should be two weeks from date instead of immediately, and that they wanted plaintiff to go ahead with the getting up of a preliminary report at once so that Mr. Wilsey, who was about to go to London, could take such report with him to London on the following week; that thereupon the following instrument was signed: (Here follows writing already copied, see pages 2 and 3 of this brief.)

(Tr. pp. 23, 24.)

In fairness and to show defendant's entire good faith in emphatically denying the obligation relied upon, the court should note what is next herein set out. It is of course but the briefest summary of defendant's evidence, because we appreciate that this court will not review points on which the evidence conflicts and the bill is settled on that theory (Tr. p. 90, bot. of page):

“Defendant offered evidence in substance and effect that at the meeting of the board of directors on *September 20, 1913*, it was stated on their behalf that no contract would be made with the plaintiff, unless it was approved by the railroad commission and that the meeting adjourned without the giving of assent to any proposition and with the understanding that Mr. Wilsey was to come from Portland to San Francisco to meet the board and that any proposition for the sale of the company's bonds or for the employment of plaintiff was to be taken up at the next meeting of the board; that it was not stated that any committee or members of the board would act for the board in making a contract with plaintiff, but plaintiff denied that any such statements were made in his presence. The defendant further offered evidence to the effect that, at the time the

document, Plaintiff's Exhibit 3, was signed, it was stated by Mr. Sisson and Mr. Manor that it expressed what they would be willing to agree to if the railroad commission approved such a contract, but this was denied by the plaintiff."

(Tr. pp. 28, 29.)

The following rebuttal testimony offered by plaintiff was, in itself, sufficient to show his entire familiarity with the situation as regards the railroad commission.

"MR. BLAKE. Q. At the meeting of September 20th of the board of directors of the present company was there anything said or done which would make your proffer of services contingent upon getting the sanction of the railroad commission?

A. No, Mr. Blake, the only recollection I have of any conversation of that was that the directors endeavored to find some way of paying me that would comply with their powers; and on Monday afterwards they had apparently thought it over and they found out by paying me in these instalments they would be able to do so. Of course, I was not concerned as to how they paid me or how they got the money, I simply knew that they wanted my services."

"Plaintiff further testified that he was, at the time of making of the contract, familiar with the fact that, during Mr. Wilsey's trip over the line of the proposed road, Mr. Wilsey had advised Mr. Donohoe that the company would have to put up \$5000 to cover his, Wilsey's expenses, that Mr. Donohoe had told him that Mr. Wilsey had written him to that effect. The plaintiff further testified:

"Seeing there was no way for the company to pay *those expenses* I had promised in con-



sideration of Mr. Wilsey allow me something out of the commissions that he might receive if he put the matter through. I had promised out of any money that I might receive to pay those expenses of Mr. Wilsey, and he said he would pay *half of them himself*; he expected them to come to \$5000; *he said he would not ask the company or ask me to become responsible for more than \$2500*. I wrote and told Mr. Wilsey or wired him, I forget which."

(Tr. pp. 29, 30.)

It is impossible to conclude that a contract to pay \$5000 to Wilsey would be bad without an order of the railroad commission, and that a contract to pay this plaintiff \$3500 or ten times that amount would be good without such an order. The plaintiff in the testimony last quoted declared that, "Seeing there was *no way* for the company to pay those expenses" (referring to the \$5000), he had promised to pay <sup>se</sup> on to Wilsey part of his receipts. It is respectfully insisted that he could not be blind as to his own contract and with perfect vision as to the contract he claims he was making. It was an entire transaction with one, and only one, purpose.

It was expected, there is no question about it, that Wilsey, who had gone to Portland, Oregon, was to come back to San Francisco. We earnestly contended in the trial court that the paper of September 22, 1913, was a meaningless thing without an arrangement with Wilsey; that Aston knew he could not tender Wilsey's services unless an arrangement was made with him, Wilsey, that he knew no arrangement could be made with him,

Wilsey, without an order of the railroad commission and it must be conceded there is not one particle of evidence that showed Wilsey did agree with the company.

After this paper of September 22, 1913, relied on, was signed, which paper controlled the learned trial court in its decision, Aston wired Wilsey, referring again to the idea of a guarantee. He spoke of guaranties and of passing those on. It is proper for us to refer to these telegrams, at least for the purpose of showing Aston's situation in the negotiations, that he fully knew of the railroad commission and its relation to the alleged contract.

"Berkeley, Cal., Sept. 24, 1913.

Wm. J. Wilsey,  
504 Selling Bldg.,  
Portland, Oregon.

Payments *guaranteed* by *Donohoe* and *Manor* as per contract. Donohoe at Willows. Returns Friday but from phone conversation had with him this evening, I feel matter can be *arranged* to your satisfaction on *Friday* morning. Shall wire you then; your attitude correct, have strengthened my hand. ASTON."

(Tr. p. 30.)

It may be stated that Mr. Sisson testified that he was asked to guarantee the payments and refused to do so.

Aston's next telegram showed clearly his exact knowledge of the Wilsey-Donohoe negotiations.

"San Francisco, Sept. 26, 1913.

Wm. J. Wilsey,  
504 Selling Bldg.,  
Portland, Ore.

Donohoe unable return here until tomorrow therefore situation unchanged. I have ample guarantee money will be paid as per agreement. *Wish you would not press matter on full immediate payment further until you come here Tuesday as embarrasses me seriously* and am doing everything I can possibly do in your interests and to meet your requirements *shall pass guarantee on to you* in any way you wish upon your arrival Tuesday. You will then find Donohoe and directors willing and anxious to meet your wishes *in every way possible*. I shall ask Donohoe to wire you tomorrow.

TAGGART ASTON."

(Tr. p. 31.)

Donohoe's telegrams to Wilsey were as follows:

"San Francisco, Sept. 22, 1913.

W. J. Wilsey,  
504 Selling Bldg.,  
Portland, Oregon.

Your proposition acceptable. Directors desire personal conference prior to execution of *formal agreement* have made satisfactory *arrangements* with Aston who has commenced on report. When can you be here on way to England.

(Signed) C. L. DONOHOE."

"San Francisco, September 23, 1913.

W. J. Wilsey,  
Selling Building,  
Portland, Ore.

What document do you require. Can have them ready here on your arrival twenty-ninth. *It is essential that my directors have confer-*

*ence with you.* Will arrange to have directors' meeting 29th. Answer.

C. L. DONOHUE."

The alleged contract was specifically conditioned on an arrangement made with Wilsey. But no agreement was reached with him. He came to San Francisco and he and the company emphatically disagreed. Inferentially and from uncontradicted evidence, it must be held that knowledge of one was the knowledge of the other. The letter of September 15, 1913, from Donohoe to Wilsey was alone sufficient to establish knowledge. We ask the court's particular attention to that letter. Aston was to share in Wilsey's profits and specifically admitted he was familiar with the correspondence. (Letters written after October 1, 1913, the date on which the court specifically found the contract was repudiated by the company, show clearly the company already had elaborate and complete reports on its road. Tr. pp. 40, 41 and 42.)

The company, on September 22, 1913, was subject to an order of the railroad commission and plaintiff knew it. And before October 1, 1913, the date on which Donohoe, the president, wrote the letter specifically withdrawing from all relations with Aston, another order was made by the commission upon an application which had been filed before any of the negotiations with Wilsey or Aston. This order confirmed the first order, and did not in any way grant authority to make the alleged contract here involved.



On October 1, 1913, Donohoe wrote Aston, as follows:

“San Francisco, Oct. 1, 1913.

Mr. Taggart Aston,  
Foxcroft Building,  
San Francisco, Cal.

Dear Sir:

Relative to the report which it has been *proposed* you shall make for the Sacramento Valley Electric Railroad as to the cost of construction and possibilities of revenue of the proposed railroad of said company, will say that owing to a recent order of the Railroad Commission of the State of California, it becomes necessary to notify you to refrain from the preparation of said report as there is no way provided for paying you for such report at the present time.

It is also apparent that Mr. Wilsey is not going on with the proposition suggested.

Please return to this office the maps, profiles, and data furnished you in the matter.

Yours respectfully,  
(Signed) CHARLES L. DONOHOE.”

If there was a semblance of a contract, it was proper for the president to repudiate it by the foregoing letter, for any such contract was the incurring of a liability before the company had \$750,000 in its treasury, the consideration exceeded \$1000 and there was no order of the railroad commission permitting the contract.

Would a contract to pay Wilsey the \$5000 have been valid? We ask that counsel explain wherein the difference lay between the two propositions. The alleged contract is invalid and so declared by statute because it is for a purpose not allowed

in an order of the railroad commission and because section 52, subdivision (b) expressly declares that the commission may attach conditions to its orders. A condition was attached in this case: No liability could be incurred until \$750,000 had been paid in; and no contract for a purpose permitted in the order and involving an expenditure of over \$1000, was to be valid unless such contract was approved *in advance* by an order of the railroad commission. It is entirely immaterial whether the order did imply some expenditures might be made. And if the order did not permit the contract, then the statute prohibited it.

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### Argument.

A presentation of the law of the case and a consideration of the points relied upon by plaintiff fall naturally under the following subdivisions:

I. The legislature has power to prohibit the making of a contract by a corporation so long as the contract does not relate to interstate commerce. The courts have no power to inquire into the reasonableness of such prohibitions or to hold that the statute must be construed as creating exceptions if the statute has negatived the idea of exceptions.

II. Had plaintiff not been created subsequent to the enactment of the public utilities statute, its regulations would still have been sustainable as a police measure. If the subject matter is one that

may be regulated, the courts will not strike down the legislative enactment. And it was proper for the legislature to say this corporation should not pay Aston \$3500 for a report, or Wilsey \$5000 for a trip to Europe to sell bonds, unless the railroad commission approved the proposition.

If a court can see any reason why a police regulation is appropriate in a given case to which it in terms applies, it cannot nullify the regulation by holding it inapplicable.

III. The power of the state exercised through commissions created under public utility statutes is validly exercised, as shown by the earlier cases and by cases already decided under the new enactments.

It is absolutely immaterial that in a given instance the act may have been violated by payments made on contracts *fully performed*.

There are reasons why a police regulation should apply in a case of this character, and the courts will not hold inapplicable a regulation which, by its terms, is applicable to this case.

IV. Where a contract is *ultra vires* and in addition void because it is prohibited, there is no case which holds that damages may be awarded for its non-fulfillment. It is properly repudiated before its performance.

V. While relief may be granted upon an irregular contract in case the power to contract is general and the mode of contracting is not restricted by a provision enacted in the interest of public

policy, yet where such a restriction exists, a contract made in disregard of it can give rise to no cause of action. Such statutes permit of no exceptions.

VI. Generally, damages are not recoverable for the breach of an illegal contract.

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## I.

**THE LEGISLATURE HAS POWER TO PROHIBIT THE MAKING OF A CONTRACT BY A CORPORATION SO LONG AS THE CONTRACT DOES NOT RELATE TO INTERSTATE COMMERCE. THE COURTS HAVE NO POWER TO INQUIRE INTO THE REASONABLENESS OF SUCH PROHIBITIONS OR TO HOLD THAT THE STATUTE MUST BE CONSTRUED AS CREATING EXCEPTIONS IF THE STATUE HAS NEGATIVED THE IDEA OF EXCEPTIONS.**

This is practically the statement of nothing but the proposition that a corporation is the creature of law. Its power can not rise higher than its source. It is quite common for state constitutions to contain provisions entitling the state legislature to withdraw powers conferred on a corporation by reserving the power to amend. Section 1, art. XII of the Constitution of the State of California provides:

“Corporations may be formed under general laws, but shall not be created by special act. All laws now in force in this state concerning corporations, and all laws that may be hereafter passed pursuant to this section, may be altered from time to time, or repealed.”



So long as vested rights are not invaded, there could be no restriction on the exercise of this power. Section 283 of the Civil Code of California reads:

“A corporation is a creature of the law, having certain powers and duties of a natural person. Being created by the law, it may continue for any length of time which the law prescribes.”

The proposition here considered was virtually declared in the case next referred to, which case, however, dealt with the regulation of the exercise of powers already granted to a corporation. When the state grants a charter to a corporation permitting it to transact business in which the public is interested, it impliedly reserves the power to regulate or stop the business of the corporation in order to prevent a misuse of the powers granted. The Supreme Court of the United States directly overruled the contention that such regulation would illegally impair the grant of powers:

“This position cannot be sustained, consistently with the power which the State has, and upon every ground of public policy must always have, over corporations of her own creation. Nor is it justified by any reasonable interpretation of the language of the company's charter. The right of the plaintiff in error to exist as a corporation and its authority, in that capacity, to conduct the particular business for which it was created, were granted, subject to the condition that the privileges and franchises conferred upon it should not be abused, or so employed as to defeat the ends for which it was established and that, when

so abused or misemployed, they may be withdrawn or reclaimed by the state, in such way and by such modes of procedure as are consistent with law. Although no such condition is expressed in the company's charter, it is necessarily implied in every grant of corporate existence. (*Terrett v. Taylor*, 9 Cranch, 51; *Ang. & Ames, Corp.* (9th Ed.) sec. 774, note.)

*Equally implied, in our judgment, is the condition that the corporation shall be subject to such reasonable regulations, in respect to the general conduct of its affairs, as the legislature may, from time to time, prescribe, which do not materially interfere with or obstruct the substantial enjoyment of the privileges the state has granted, and serve only to secure the ends for which the corporation was created. (Sinking Fund Cases, 99 U.S. 700; 25 L. ed. 496; Commonwealth v. Bank, 21 Pick., 542; Commercial Bk. v. Mississippi, 4 Sm. & M. 503.) If this condition is not necessarily implied, then the creation of corporations, with rights and franchises which do not belong to individual citizens, may become dangerous to the public welfare through the ignorance, or misconduct, or fraud of those to whose management their affairs are intrusted. It would be extraordinary if the legislative department of a government, charged with the duty of enacting such laws as may promote the health, the morals and the prosperity of the people, might not, when unrestrained by constitutional limitations upon its authority, provide, by reasonable regulations, against the misuse of special corporate privileges which it has granted, and which could not, except by its sanction, express or implied, have been exercised at all."*

*Chicago Life Ins. Co. v. Needles*, 113 U.S. 574; 28 L. ed. 1087.

Defendant is a corporation, it is a creature of the statute and it is a public utility and it is the intent manifest in the different parts and in the entire structure of the statute, which is a part of its being, that the orders of the commission, or the omission on the part of the commission to order, shall be respected. Section 30 of the act also declares the orders of the commission shall be obeyed. Section 31 gives a power of supervision and regulation to the commission. It can institute investigations of its own motion. That is a power that has existed in the legislative and executive departments of government. A corporation's powers, where the legislature has elected to reserve the right of repeal, may all be repealed.

The Holyoke Water-Power Co. v. Lyman,  
15 Wall. 500; 82 U. S. 500; 21 L. ed. 133.

In the Dartmouth College case, the right to amend or repeal was not reserved.

The charter of a corporation formed under general law consists of its articles of incorporation, *taken in connection with the law under which the organization took place.* (Quoting from I Morawetz on Private Corporations, sec. 318; citing also, Cook on Corporations, sec. 669.)

Traer v. Lucas Prospecting Co., 124 Iowa  
107; 99 N. W. 290, 292 (Col. 2).

A corporation derives its power only from the act, grant, charter or patent creating it. No act of the corporation will enlarge its powers.

Salem Milldam Corp. v. Ropes, 23 Mass.  
23, 32.

Its violation of the law in one case could not make the law for another case.

This is entirely aside from the doctrine that a corporation may not plead that a contract is *ultra vires*. That principle does not mean that the state may not, independently of the police power, forbid the exercise of certain corporate power. It undoubtedly lies within the power of the state to make the plea of *ultra vires* a good plea in all cases, for the state has the power to deny corporate action in any form. It could restore the rule *which first existed* that neither the corporation or an individual dealing with it could rely on a contract which was *ultra vires* the corporation.

In the case next referred to the District Court for the Northern District of Virginia held that the Blue Sky Law of West Virginia was invalid, but did so expressly upon the ground that its terms applied to natural persons as well as to corporations, and that it also interfered with interstate commerce. Judges Pritchard and Dayton concurred in the opinion, Judge Woods dissented, holding the law valid. But in the majority opinion, speaking of the power of the legislature over corporate action, it was said:

“The exercise of this control over the operations of corporations by state legislature is perfectly legitimate from the legal point of view, for ever since the decision in *Bank v. Earle*, 13 Pet. 519, 10 L. Ed. 274, it has been settled that a corporation can have no legal existence outside of the boundaries of the sovereignty by which it was created; that such corporations



are not 'citizens' within the meaning of article 4, sec. 2, of the federal constitution, entitling them 'to all privileges and immunities', as such 'in the several states'; and the power of the states to determine the terms and conditions under which they, whether domestic or foreign, may do business in the state, has been repeatedly upheld, by the Circuit Court of Appeals for this circuit in *Kirven v. Va. Car. Chem. Co.*, 145 Fed. 288, 76 C. C. A. 172, 7 Ann. Cas. 219; *Cumberland Gas Light Co. v. West Va. & Md. Gas Co.*, 188 Fed. 585, 110 C. C. A. 383.

A state legislature may therefore prevent foreign corporations from transacting business altogether within its territorial limits, and it may limit all corporations, foreign and domestic, as to what particular kind of business they may or may not do within the state. *So far as they are concerned, it is not a question of police power nor of interstate commerce, but purely and simply the exercise of a well recognized sovereign power over these artificial bodies."*

*Bracey v. Darst*, 218 F. 480, 494, 495.

The court plainly indicated that if the statute had been framed like the Florida statute, it would have upheld it for the reasons declared in an opinion rendered by the Supreme Court of Florida. The Florida statute did not contain the obnoxious provisions relating to natural persons.

As regards foreign corporations, it has been repeatedly ruled, the state has complete power to prohibit them from making any sort of contract relating to intrastate business.

*Hooper v. California*, 155 U. S. 648; 39 L. ed. 297.

This rule is of course inapplicable if the commerce involved is interstate.

International Text Book Co. v. Pigg, 217

U. S. 91; 54 L. ed. 678;

Buck Stove & Range Co. v. Vickers, 226

U. S. 205; 57 L. ed. 189.

The first case decided by the Supreme Court of California which dealt with the powers of the new railroad commission makes it evident that the legislative department clearly intended that the public utilities act should be construed as conferring on the railroad commission a legislative-administrative body—plenary power to control the business of a public utility. The people of the state in amending section 22 of art. XII of the constitution declared that the constitutional provision and powers conferred in pursuance of it, were controlling over other sections of the constitution. The statute enacted denied the state courts the power to interfere with the orders of the commission except upon jurisdictional grounds. The right to review evidence upon which the commission acted was denied to the state courts, and the Supreme Court of the state alone was granted power to review the orders of the commission, upon jurisdictional grounds.

Pac. Tel. etc. Co. v. Eshleman, 166 Cal. 653 to 659.

The statute in question was passed under the fullest possible and most express constitutional sanction. It in plain terms says that a railroad company shall not dispose of the proceeds of stock

sales for any purpose until the railroad commission gives it sanction. The statute is too plain for construction.

The court can not add exceptions to it. It first declares the purpose of the expenditure must be declared in the order; it then, to remove the question still further from the realm of construction, lays down a clear and plain prohibition against expenditures that have not been permitted by the commission. The plaintiff is here asking that the court substitute its judgment for that of the railroad commission; he is asking this court to grant him a judgment which by virtue of both affirmative and negative provisions in the statute in question the court is without authority to grant him. *And this the plaintiff knew.* To allow the contract in question would sanction such a contract as Wilsey proposed should be made in his favor. There was utterly no difference between the two propositions in principle. It was in fact all one proposition. To hold these large expenditures are not within the statute, is to hold the statute inoperative in cases where the legislature intended it should operate.

Nor is it the slightest objection to the exercise of a state's power to prohibit corporate action, that thereby a contract with a citizen is rendered void.

“This would make the exercise of a substantial and valuable power by a state government depend not on the actual facts of the transactions over which it lawfully seeks to extend its

control, but upon the disposition of a corporation to resort to a mere subterfuge in order to evade obligations properly imposed upon it. Public policy forbids a construction of the law which leads to such a result, unless logically unavoidable."

\* \* \* \* \*

"One more contention remains to be noticed. It is said that the right of a citizen to contract for insurance for himself is guaranteed by the 14th Amendment, and that, therefore, he cannot be deprived by the state of the capacity to so contract through an agent. The 14th Amendment, however, does not guarantee the citizen the right to make within his state, either directly or indirectly, a contract, the making whereof is constitutionally forbidden by the state. The proposition that, because a citizen might make such a contract for himself beyond the confines of his state, therefore he might authorize an agent to violate in his behalf the laws of his state, within her own limits, involves a clear *non sequitur*, and ignores the vital distinction between acts done within and acts done beyond a state's jurisdiction."

Hooper State of California, 155 U.S. 655, 658, 659; 39 L. ed. 297.



## II.

HAD PLAINTIFF NOT BEEN CREATED SUBSEQUENT TO THE ENACTMENT OF THE PUBLIC UTILITIES STATUTE, ITS REGULATIONS WOULD STILL HAVE BEEN SUSTAINABLE AS A POLICE MEASURE. IF THE SUBJECT MATTER IS ONE THAT MAY BE REGULATED, THE COURTS WILL NOT STRIKE DOWN THE LEGISLATIVE ENACTMENT. AND IT WAS PROPER FOR THE LEGISLATURE TO SAY THIS CORPORATION SHOULD NOT PAY ASTON \$3500 FOR A REPORT, OR WILSEY \$5000 FOR A TRIP TO EUROPE TO SELL BONDS, UNLESS THE RAILROAD COMMISSION APPROVED THE PROPOSITION.

IF A COURT CAN SEE ANY REASON WHY A POLICE REGULATION IS APPROPRIATE IN A GIVEN CASE TO WHICH IT IN TERMS APPLIES, IT CANNOT NULLIFY THE REGULATION BY HOLDING IT INAPPLICABLE.

If a part of the law under which a railroad corporation receives its franchise, prohibits that corporation and those dealing with it from making contracts which will reach its funds consisting of contributions by its stockholders, unless such contracts are authorized by a railroad commission, it is apparent that no question of unlawful legislative interference with the corporation's property can be raised. The defendant corporation was organized on May 4, 1912 (Tr. p. 15). The alleged contract was made on September 22, 1913. Doubly forcible therefore is the language of the Supreme Court hereinbefore quoted in the case of *Chicago Life Ins. Co. v. Needles*, 113 U. S. 574; 28 L. ed. 1087:

“It would be extraordinary if the legislative department of a government, charged with the duty of enacting such laws as may promote the health, the morals and the prosperity of the

people, might not, when unrestrained by constitutional limitations upon its authority, provide, by reasonable regulations, against the misuse of special corporate privileges which it has granted, *and which could not, except by its sanction, express or implied, have been exercised at all.*"

Where the legislature has changed public policy, it is only in the clearest case that the new statute will be held invalid:

"This court can know nothing of public policy except from the constitution and the laws and the course of administration and decision. It has no legislative powers. It cannot amend or modify any legislative acts. It cannot examine questions as expedient or inexpedient, as politic or impolitic. Considerations of that sort must, in general, be addressed to the legislature. *Questions of policy determined there are concluded here.*"

License Tax Cases, 72 U. S. 462; 18 L. ed. 497, 500.

"This is one in the exercise of the police power, *and the means to be employed to promote the public safety are primarily in the judgment of the legislative branch of the government*, to whose authority such matters are committed, and so long as the means have a substantial relation to the purpose to be accomplished, and there is no arbitrary interference with private rights, the courts cannot interfere with the exercise of the power by enjoining regulations made in the interest of public safety which the legislature has duly enacted."

Missouri Pac. Ry. Co. v. Omaha, 235 U. S. 121; 59 L. ed. 157.

Although a regulation may be vexatious to honest dealers in a certain business yet the propriety of such regulation is for the legislature to determine and it will not be held invalid unless it appears on the face of the statute or from some fact of which the courts will take judicial notice, that it infringes some right secured by fundamental law.

“Every possible presumption,” Chief Justice Waite said, speaking for the court in the Sinking Fund cases, “is in favor of the validity of a statute, and this continues until the contrary is shown *beyond a rational doubt*. One branch of the government cannot encroach on the other without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule.”

Powell v. Pennsylvania, 127 U. S. 678; 32 L. ed. 256, 257.

The Supreme Court of the United States has had frequent occasion to pass upon state statutes adopted in the exercise of police power.

“It is undoubtedly true that it is the right of every citizen of the United States to pursue any lawful trade or business, under such restrictions as are imposed upon all persons of the same age, sex and condition. But the possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order and morals of the community.”

Field, J., in Crowley v. Christensen, 137 U. S. 86; 34 L. ed.. 623.

Referring to the fourteenth amendment, the Supreme Court, in the case next cited, said:

“But neither the amendment, broad and comprehensive as it is, nor any other amendment was designed to interfere with the power of the state, sometimes termed its ‘police power’, to prescribe regulations to promote the health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the state, develop its resources and add to its wealth and prosperity.”

Field, J., in *Barbier v. Connolly*, 113 U. S. 31; 28 L. ed. 925.

In the case last mentioned, the ordinance of the City and County of San Francisco involved required the procurement of a certificate from the health officer and board of fire commissioners as a condition precedent to the doing of the business involved and the court held that this was not an improper regulation. The doing of the business, without this certificate, was made criminal.

A state may, of course, exercise police power in other instances than where the prevention of crime is intended.

“We hold that the police power of the state embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health or public morals or the public safety.”

*Chicago, B. & Q. R. Co. v. Illinois*, 200 U. S. 561, 592; 50 L. ed. 609.

“ \* \* \* the police power is not subject to any definite limitations, but is co-extensive with



the necessities of the case and the safe-guard of the public interests”.

Canfield v. U. S., 167 U. S. 524; 42 L. ed. 262.

*“Contracts Unenforceable by Written Law.* Subject to the restrictions in the constitution, the legislature may protect public safety, health and morals. If, in the exercise of this power, the legislature prohibits certain classes of contracts or declares them void, such contracts are, of course, void and unenforceable. The intention of the legislature to withdraw the given subject matter from the scope of the contract may be expressed in different ways. The act in question may be criminal. Contracts to perform such acts will be unenforceable.”

Page on Contracts, Vol. I, sec. 327.

A contract for selling tickets at less than the rate established by the interstate commerce commission is wholly illegal.

Page on Contracts, Vol. I, sec. 328.

Citing,

Raleigh etc. R. R. Co. v. Swanson, 102 Ga. 754; 28 S. E. 601.

The Supreme Court of the United States has repeatedly held that a railroad company is so public in nature that its business is subject to the regulation of a railroad commission.

“The elementary proposition that railroads, from the public nature of the business by them carried on and the interest which the public have in their operation, are subject as to their state business to *state* regulation, which may be exerted either directly by legislative authority or by administrative bodies endowed with

*power to that end, is not and could not be successfully questioned, in view of a long line of authorities sustaining that doctrine."*

Atlantic C. L. R. Co. v. North Carolina Corp.  
Com., 206 U. S. 19, 20; 51 L. ed. 942.

At an early date the Supreme Court pointed out the public nature of railways.

"Though the corporation was private, its work was public, *as much so as if it were to be constructed by the state*. Private property can be taken for a public purpose only, and not for private gain or benefit. Upon no other ground than that the purpose is public can the exercise of the power of eminent domain in behalf of such corporations be supported. This view of the subject has been taken by the Supreme Court of Michigan. *Swan v. Williams*, 2 Mich. 427."

*Pine Grove Township v. Talcott*, 86 U. S. 666;  
22 L. ed. 233.

Railways are like public highways. They are the "creatures" of the law and state aid may be rendered:

"Then what is there in the Constitution of the State of Nebraska which denies this power to the Legislature? There is no direct or express prohibition. General legislative power is vested in the Legislature. None is reserved to the people of the state."

*C. B. & Q. R. R. Co. v. Otoe County*, 83 U. S. 667; 21 L. ed. 380.

As Mr. Justice Henshaw declared in the opinion of the Supreme Court of the State of California (166 Cal. 658), the adoption of the amendment

to section 22, article XII of the constitution, on October 10, 1911, gave the legislature power to adopt a statute, the provisions of which should not be destroyed by other provisions in the constitution.

A federal court will follow the interpretation given a statute by a state court.

Underground R. R. v. City of New York,  
116 F. 959;

Chattanooga Bldg. Assn. v. Denson, 189 U. S.  
408; 47 L. ed. 870.

Recent years have seen the growth of federal regulation of the interstate operations of public utilities.

The printed schedule of rates filed by a common carrier with the interstate commerce commission must contain such items as the interstate commerce commission may require and the statute fixes a penalty for failure to comply with the commission's order.

34 Stat. at L. 586;

36 Stat. at L. 548;

U. S. Compiled Statutes (Sup. 1911), p. 1201  
(Act of June 18, 1910).

The commission may now establish maximum rates for interstate transportation and such rates must be adopted and followed.

(Sec. 15. Act of June 18, 1910, C. 309) 36  
Stat. at L. 554;

U. S. Compiled Statutes, (Sup. 1911) p. 1297.

Congress may fix a penalty and did so for the violation of the order of the commission, the penalty being \$5000 for a single offense and an addition of \$5000 per day in case the offense continued. It made the penalty recoverable in a civil action. But in section 15 of the act it was also made the duty of the carrier to adopt the rate; it could be compelled to do so and thereupon the violation of the rate was a crime under additional provisions of the act.

U. S. Compiled Statutes, (Sup. 1911) p. 1302.

The federal statutes now make adequate provision for safety appliances on interstate trains. A violation of the standards fixed by the interstate commerce commission is unlawful and the violation is subjected to a penalty.

36 Stat. at L. 298. Act April 14, 1910. C. 160.

U. S. Compiled Statutes, (Sup. 1911) p. 1328.

In 1910, Congress, in amending the interstate commerce act, provided *for a commission to investigate stocks and bonds of railroad corporations.*

36 Stat. at L. 556. Act June 18, 1910, sec. 16;

U. S. Compiled Statutes, (Sup. 1911) pp. 1332, 1333.

Congress could adopt a statute of the kind here involved, even though the federal constitution is a grant of power. The act would be good as against a railway company existing under a federal charter.



Its prohibition supplementing an order of its commission would not be "special legislation", as was contended by plaintiff. The commission created could prohibit liabilities until a certain fund was raised, just as was done here.

Congress may penalize the violation of a rule established by an inspector of locomotives used in interstate commerce.

Act of Feb. 17, 1911. C. 103, sec. 9;

36 Stat. at Large, 916;

U. S. Compiled Statutes, (Sup. 1911) p. 1337.

The insurance business which is not so public as that of a public utility, yet which is public in its nature and if misconducted may greatly injure the public, is subject to regulation. The state may require certain conditions in the contract of insurance.

Citizen's Insurance Co. v. Clay, 197 Fed. 437.

The legislature may prescribe a standard form of policy.

In re Opinion of Justices, 97 Me. 590; 55 A. 828;

Considine v. Met. Life Ins. Co., 165 Mass. 462; 43 N. E. 201.

The right to transact such business is regarded as a *franchise*, and the state may vest authority to transact such business exclusively in corporations. While at common law the right to insure was not a franchise, it is at the present time, and a company

which accepts the franchise takes it subject to the restrictions contained therein.

John Hancock Mutual Life Ins. Co. v. Warren, 181 U. S. 73, 75.

Section 52 of the Public Utilities Act declares the right of a railroad corporation to issue stocks is a franchise. We shall hereafter show in what way the Court of Civil Appeals of Texas construed a statute similar to the act here in question.

*We repeat that if a court can see any reason why a police regulation is appropriate in a given case to which it in terms applies, the court will not nullify the regulation by holding it inapplicable.*

The immigration case in which the court held that the federal contract labor law did not apply to the bringing of a minister to this country to preach is familiar to this court. The court there properly held that there was no reason why the statute should apply to such a case. But we submit there was no difference between the alleged Aston contract and the attempted Wilsey contract; no difference between it and any other contract which attempted to reach what the law virtually regards as a trust fund of the stockholders. It was prohibited. *Even though it should be conceded the order in question permitted some expenditures the alleged contract was invalid; for that order specified the purposes for which expenditures could be made; it was the only order, and it declared that if the consideration of the contract exceeded \$1000 the contract must be approved by the commission.*

Some courts have held that the statute prohibiting the sending of indecent matter through the mails does not include the sending of such matter by a physician, and some cases declare that in a given case the relations of the parties are to be considered, and the law given effect if they may be affected. But these are exceptional cases. In considering them the court in the case next cited, said:

“ ‘In construing statutes, the well-established rule is, where the language of the statute is clear and free from ambiguity, the duty of the court is to enforce it as it is, as there is nothing to construe. *Thornley v. United States*, 113 U. S. 310, 5 Sup. Ct. 491, 21 L. ed. 499; *Scotts v. Reid*, 10 Pet. 524, 527, 9 L. ed. 519; *Bate Refrigerating Co. v. Sulzberger*, 157 U. S. 1, 15 Sup. Ct. 508, 39 L. ed. 601.’

\* \* \* \* \*

In *Scotts v. Reid*, the court said:

‘Where the language of the act is explicit there is great danger in departing from the words used to give an effect to the law which may be supposed to have been designed by the Legislature. \* \* \* It is not for the court to say that where the language of the statute is clear that it should be so construed as to embrace cases, because no good reason can be assigned why they are excluded from the provisions.’

In *United States v. Chase*, *supra*, the court in construing this statute before it was amended by the act of September 26, 1888, said:

\* \* \* ‘We recognize the value of the rule of construing statutes with reference to the evil they were designed to suppress as an important aid in ascertaining the meaning of language in them which is ambiguous and equally suscept-

ible of conflicting constructions. But this court has repeatedly held that this rule does not apply to instances which are not embraced in the language employed in the statute, or implied from a fair interpretation of its context, even though they may involve the same mischief which the statute was designed to suppress.' ”

U. S. v. Musgrave, 160 Fed. 700.

Citing the case last cited, it is said in the footnotes of the text next mentioned:

*“An exception not made by the legislature cannot be read into the statute. Kunkalman v. Gibson, 171 Ind. 503, 84 N. E. 985; 86 N. E. 850; Siren v. State, 78 Neb. 778, 111 N. W. 798; U. S. v. Musgrave, 160 Fed. 700.”*

36 Cyc. 1113.

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### III.

**THE POWER OF THE STATE EXERCISED THROUGH THE COMMISSIONS CREATED UNDER PUBLIC UTILITY STATUTES IS VALIDLY EXERCISED, AS SHOWN BY THE EARLIER CASES AND BY CASES ALREADY DECIDED UNDER THE NEW ENACTMENTS. IT IS ABSOLUTELY IMMATERIAL THAT IN A GIVEN INSTANCE THE ACT MAY HAVE BEEN VIOLATED BY PAYMENTS MADE ON CONTRACTS FULLY PERFORMED.**

**THERE ARE REASONS WHY A POLICE REGULATION SHOULD APPLY IN A CASE OF THIS CHARACTER, AND THE COURTS WILL NOT HOLD INAPPLICABLE A REGULATION WHICH, BY ITS TERMS, IS APPLICABLE TO THIS CASE.**

Illustrations of the recognized power of the state to regulate the business of a *state* railroad corporation are shown in cases dealing with the regulation



of the service and also dealing with the regulation of the use of the funds of the corporation.

A state railway commission has power to compel physical connection between railway lines and if all the income of the company *in the state* furnishes a reasonable return, then the order is treated as valid.

Atlantic Coast Line R. Co. v. North Carolina Corporation Commission, 206 U. S. 1; 51 L. ed. 933, 942;

State of Washington ex rel. Oregon R. & Nav. Co. v. Fairchild, 224 U. S. 510; 56 L. ed. 863;

Wisconsin M. & P. R. Co. v. Jacobson, 179 U. S. 287; 45 L. ed. 194.

*Undoubtedly the use a railroad company makes of its funds reflects on the service it renders and, secondly, the regulation of the use of a railroad company's funds during its formative period is justifiable as a police measure extending protection to the investor.*

“ \* \* \* The commission's supervision over issues of stocks, bonds and other securities of public utilities is among the most important of its functions. It is the duty of the Commission to see to it that stocks, bonds and other securities of such utilities are issued only for the purposes authorized by law *and the proceeds thereof are applied only to the purposes* and in the amounts specified in the Commission's order” etc.

In re Tidewater Southern Ry. Co. Bond Issue, Vol. 1, Opinions and Orders of Railroad Commission of California, 624, 625.

Regarding the New York statute of 1910, it was held:

“One of the primary purposes of the general law is to prevent over capitalization and to protect the public from the floatation of securities that do not represent actual values. The mischief is just as great, whether this over capitalization arises at the initiation of the corporation or whether it is the result of a process by which property has been replaced, and the original capitalization is still carried on the books in addition to the cost of replacement. In view then of the general purposes, of the general supervision given by section 66 of the statute, and of the certificate required to be made under section 69, we are of the opinion that the statute should be so construed as to authorize a condition that those securities shall not be sold over a misleading statement in the fixed capital amount. It is true that the powers of the commission are stringently stated in the Delaware & Hudson Case, 197 N. Y. 12; 90 N. E. 60; but that statement must be read in connection with the question then before the court for decision.”

People v. Stevens, 143 App. Div. 789; 128 N. Y. S. 440, 444.

We take the following from a case decided by the Supreme Court of Massachusetts on January 10, 1914:

“It is apparent from the review of statutes that the progressively developed policy of the commonwealth has been to regulate and supervise the issue of stock obligations by railroad corporations in such a way as to prevent stock watering or financial exploitation of such corporations. In earlier years statutes laid down general rules controlling the conduct of railroad corporations but leaving the execution to the

judgment of the stockholders and officers of the corporations. Since 1894, *through the instrumentality of a public board, supervision of this corporate judgment is required, to the end that only such and so great financial obligations should be issued as would meet the reasonable necessities of the corporation.* The policy has been manifested *as to other public service corporations, such as gas and electric light companies and street railway companies, etc.* \* \* \*

The provisions of St. 1913, C. 784, secs. 15 and 16, which govern the present application must be read and interpreted *in the light of the history of the statutory development of public regulation of stock issues of railroad corporations, etc.* \* \* \* *'Any order of the commission approving any such issue of stocks, bonds, notes or other evidence of indebtedness may provide for the application of the proceeds thereof to such particular uses as the commission shall by that order or by some subsequent order specify, and the corporation shall not apply such proceeds otherwise than as specified in such order or orders'* ", etc.

The court proceeded to state that the aim of the statute was that a reasonable and proper financial return for its securities should be made to the corporation and the amount so received be expended for the lawful purposes specified in the application.

Buckley v. N. Y. N. H. & H. R. Co., 216 Mass. 432; 103 N. E. 1033.

These ventures are largely started by the public and the state has power to subject the fund contributed to protective regulation, not only in the interest of the investor but also in the interest of the public, which is to be served.

The state has the clear power to pass such laws in the interest of the general public. The power of public utilities commission to determine the purpose of and to permit a bond issue by a public utility is not to be exercised in a perfunctory way. The statute was passed to cure a well known evil.

Interstate Tel. & Tel. Co. v. Board of Public Utilities Commissioners, 84 N. J. L. 184; 86 At. 363, 365, col. 1.

The order of a railroad commission is presumptively valid and, in the absence of proof showing clearly an abuse of power, the order will be upheld.

State v. Louisville & N. R. Co., 62 Fla. 315; 57 So. 175.

A federal court will not hold an order of a state railroad commission is illegal unless there are very clear grounds for so doing.

Seaboard Air Line Ry. Co. v. R. R. Commission of Georgia, 206 Fed. 181.

The Supreme Court of the United States has said that where the statute permits an appeal to the Supreme Court of the state directly from the order of the railroad commission (as here, see sec. 66 of the act), the federal courts will not, on the ground of comity, interfere until the appeal to the state Supreme Court is heard.

Prentis v. Atlantic Coast Line Co., 211 U. S. 210; 53 L. ed. 150.

We have searched diligently to find any authority which qualifies the force of the statute of this state



creating the new railroad commission and conferring power upon it to specify the use that may be made of the proceeds of stock sales. The statute makes a use not permitted unlawful. Sound reasons for its adoption existed. Defendant is a corporation, a creature of the statute. Defendant company was created after the statute was passed. Its powers were limited by that statute. In the absence of authority against the statute, and in the face of decisions upholding its provisions, it must follow that it is a valid statute.

The agreement in a note that its repayment shall be secured by bonds secured by a first mortgage as soon as such bonds are authorized by the railroad commission cannot be enforced where the railroad has gone into bankruptcy and has not obtained an order of the railroad commission. *The court will not undertake to say that the railroad commission would have authorized the bonds.*

Augusta Trust Co. v. Federal Trust Co., 140  
Fed. 930.

In the Circuit Court of Appeals, Judge Putnam said that, if the company was yet a going concern, the court *might* entertain a bill to compel *an application* to the railroad commission.

Augusta Trust Co. v. Federal Trust Co., 153  
Fed. 157, 162.

In the case at bar the defendant earnestly and in good faith contended that it had made no contract. Its good faith in asserting its defense was never

questioned. As to whether there was a contract was a point which the trial court allowed to be thoroughly briefed. Certain it is that the court would hesitate to grant a decree in equity where the party complaining sought to evade an express order of the commission and every person connected with the company was emphatically contending that the alleged agreement had never been made, and the contract has never been carried out. The statute so clearly makes it a question in which the stockholders are concerned. The statute does not permit the court to substitute its judgment for that of the commission.

The police power of the state extends to the regulation of investment corporations and their contracts. The state may determine the form of the contract to be used by such companies. The court pointed out that freedom of contract was a qualified right, a right subject to reasonable regulations.

Standard Home Co. v. Davis, 217 F. 904, 907, 908.

Where a state statute provides that notes may be issued by a railroad corporation only upon the approval of a state railroad commission, an indorser upon a note issued without such approval is not liable. *Held also it was utterly immaterial that the defense had been waived by the company as against another holder.*

Davis v. Watertown Nat. Bank, .....Tex.  
Civ. App. .... ; 178 S. W. 593.

The Texas statute (Vernon's Sayles Civil Statutes, Art. 6717) declared:

“Among other things, the power and authority of issuing and executing bonds or other evidences of debt, and all kinds of stocks and shares thereof and the execution of all liens and mortgages by railroad corporations in this State are special privileges, and the right of supervision, regulation, restriction and control of which has always been, is now, and shall continue to be vested in the state government to be exercised in accordance with the provisions of this and other laws.”

Promissory notes executed in disregard of the foregoing statute were held invalid.

Jones v. Abernethy, .....Tex. Civ. App.  
.....; 174 S. W. 682.

The first Texas case declared that it was immaterial that a violation of the statute had occurred in a given case.

It is no doubt true that when an administrative department construes a statute that construction is entitled to weight. But the rule has absolutely no application where the language of a statute is not doubtful.

36 Cyc. 1142.

The federal cases referred to in the text are directly in point:

Studebaker v. Perry, 184 U. S. 258; 46 L. ed. 528;

Denning v. McClaughry, 113 F. 638; affirmed 186 U. S. 49; 46 L. ed. 1049;

U. S. v. McFarland, 28 App. Cas. 552;  
 Houghton v. Payne, 194 U. S. 88, 100; 48  
 L. ed. 891;

In the last case it is said:

“A custom of the Department, however, long continued by successive officers, must yield to the positive language of the statute. As was said in the Graham Case (p. 221, L. ed. p. 127, Sup. Ct. Rep. p. 583), ‘if there were ambiguity or doubt, then such a practice, begun so early and continued so long, would be in the highest degree persuasive, if not absolutely controlling, in its effect. But with the language clear and concise, and with its meaning evident, there is no room for construction, and consequently no need of anything to give it aid. The cases to this effect are numerous. *Edwards v. Darby*, 12 Wheat. 206, 6 L. ed. 603; *United States v. Temple*, 105 U. S. 97; 26 L. ed. 967; *Swift & C. & B. Co. v. United States*, 105 U. S. 691; 26 L. ed. 1108; *Ruggles v. Illinois*, 108 U. S. 526, 27 L. ed. 812, 2 Sup. Ct. Rep. 832.”

At the outset the railroad commission was so crowded with work that it could not give prompt attention to applications or exercise the degree of supervision which was expected of it, and it would not be surprising if it allowed departures from the law in some cases, but this never was its settled practice. Obligations or shares of stock issued by railroad companies or other public utilities are issued only under the commission's order, and no member of the commission today recognizes that a public utility may use the proceeds of the sale of bonds or stocks for any purpose whatever, unless



that purpose is specified in an order of the commission.

The power here is a police power and no authority is produced to show that police power does not embrace it.

The state itself could operate its railroads. If it did so, it could subject all railroad property and contracts in relation to the same to conditions governing ordinary public contracts. *It could provide that contracts for cars, machinery and work-shops and maintenance could be made by its superintendent involving payment of amounts not exceeding \$3000.00, but if the amount of the contract exceeded \$3000.00, the contract must be approved by the governor. In such a case an unapproved contract in excess of \$3000.00 is absolutely void and unenforceable.*

Tappan, v. Western Atlantic Railroad, 62 Ga. 198.

The statute clearly applied to the contracts proposed by Aston and by Wilsey.

*If a court can see any reason why a police regulation is appropriate in a given case, it can not nullify the regulation by holding it inapplicable. There are just as good grounds for holding the police regulation here in question applicable to the alleged Aston contract or to the attempted Wilsey contract, as to any other contract which it is conceivable the corporation might make. The Massachusetts, New Jersey and Texas cases are directly in point.*

## IV.

WHERE A CONTRACT IS *ULTRA VIRES* AND IN ADDITION VOID BECAUSE IT IS PROHIBITED, THERE IS NO CASE WHICH HOLDS THAT DAMAGES MAY BE AWARDED FOR ITS NON-FULFILLMENT. IT IS PROPERLY REPUDIATED BEFORE ITS PERFORMANCE.

And such is California law.

“It is said, however, that when a contract which was *ultra vires* has been performed on one part, the other is then estopped to plead that the contract was *ultra vires*. Here, however, the contract was void, because against public policy. In such cases, courts will not grant relief to either party.”

Visalia G. and E. L. Co. v. Sims, 104 Cal. 332.

In the last mentioned case the Supreme Court of California expressly ruled that a guaranty on an *ultra vires* contract which was also illegal as being contrary to public policy, was not enforceable. The grantee of a gas franchise surrendered possession of its works and leased its rights; defendant had guaranteed certain payments by the lessee. Held, that contract was *ultra vires* and *also illegal*, that a suit was not maintainable on the executory undertaking, nor would those cases apply which allow a recovery of the value of the thing surrendered because there was no showing of benefit. The case has never been overruled or criticized in the slightest degree. It supports our contention that an illegal contract which is executory may and should be repudiated.

In the case next cited, the Supreme Court of the United States said:

“And in regard to corporations, the rule has been well laid down by Comstock, Ch. J., in *Parish v. Wheeler*, 22 N. Y. 494, that the executed dealings of corporations must be allowed to stand for and against both parties when the plainest rules of good faith require it.

But what is sought in the case before us is the enforcement of the unexecuted part of this agreement. So far as it has been executed, namely: the four or five years of action under it, the accounts have been adjusted, and each party has received what he was entitled to by its terms. There remains unperformed the covenant to arbitrate with regard to the value of the contract. It is the damages provided for in that clause of the contract that are sued for in this action; *damages for a material part of the contract never performed; damages for the value of a contract which was void*. It is not a case of a contract fully executed. The very nature of the suit is to recover damages for its non-performance. As to this, it is not an executed contract.

Not only so, but it is a contract forbidden by public policy and beyond the power of the defendants to make. Having entered into the agreement, it was the duty of the company to rescind or abandon it at the earliest moment. This duty was independent of the clause in the contract which gave them the right to do it. Though they delayed its performance for several years, it was, nevertheless, a rightful act when it was done. Can this performance of a legal duty, a duty both to stockholders of a company and to the public, give to plaintiffs a right of action? Can they found such a right on an agreement void for want of corporate authority and forbidden by the policy of the

law? To hold that this can be done is, in our opinion, to hold that any act done under a void contract makes all its parts valid, *and that the more you do under a contract forbidden by law, the stronger the claim to its enforcement in the Courts.*"

Thomas v. West Jersey R. R. Co., 101 U. S. 71; 25 L. ed. 950, 953.

"RIGHT TO DISAFFIRM ULTRA VIRES CONTRACTS AFTER PART PERFORMANCE. (1) In General. There are decisions which uphold the right of the corporation to disaffirm an ultra vires contract after it has been partly executed, but other courts find an estoppel in a part performance by the other party to the contract. The decisions under this head cannot be reconciled; but an examination of them will lead to the conclusion that those which support a continuing duty of rescission were cases where corporations had attempted to cast off their public duties by devolving them upon other corporations, in which case the continued execution of the agreement is regarded as a continuing violation of law carrying with it a continuing duty of rescission, which duty is not diminished by lapse of time.

(II) CONTRACTS ABNEGATING PERFORMANCE OF PUBLIC DUTIES. The principle then is applicable with special force in the case of contracts whereby a corporation seeks to devolve upon another corporation, without the consent of the legislature, its public duties, in which case the courts will not allow the contract to gain strength and acquire validity by lapse of time.

(III) CONTRACTS OR ARRANGEMENTS WHICH ARE OTHERWISE OPPOSED TO PUBLIC POLICY. The rule applies with equal force to any contract or arrangement between corporations which are for other reasons opposed to a sound



public policy. Thus where several such corporations unite their funds and properties under an arrangement called a "trust", the object of which is to prevent competition, and to monopolize and engross an article of commerce, then the scheme is denounced by a sound public policy, and a court of justice will uphold any member of such partnership in withdrawing from it at any time.

(IV) CONTRACTS WHICH OTHERWISE INVOLVE CONTINUING VIOLATION OF LAW. From these decisions we may safely collect the principle that there is always a right of rescission where a continuing performance involves a continuing violation of law. This principle has indeed been extended by some courts to cases where no question of public policy can be supposed to have been involved, but where the question was merely the right of a private corporation to withdraw, upon restoring the consideration to the other party, from a contract entered into in excess of its powers."

10 Cyc. 1153.

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## V.

**WHILE RELIEF MAY BE GRANTED UPON AN IRREGULAR CONTRACT IN CASE THE POWER TO CONTRACT IS GENERAL AND THE MODE OF CONTRACTING IS NOT RESTRICTED BY A PROVISION ENACTED IN THE INTEREST OF PUBLIC POLICY, YET WHERE SUCH A RESTRICTION EXISTS, A CONTRACT MADE IN DISREGARD OF IT CAN GIVE RISE TO NO CAUSE OF ACTION. SUCH STATUTES PERMIT OF NO EXCEPTIONS.**

It is true that where *general* power to contract for service or materials exists in a municipal corporation, it may be bound upon an implied contract

therefor resulting from its accepting and using the thing or service in question. But where the power to contract is a power to contract in a particular and restricted mode only, the statute is the measure of the power. This rule has been repeatedly laid down by the Supreme and District Courts of Appeal of California in suits against municipal corporations. And we are dealing with the contract of a quasi public corporation, at least a public utility corporation. Where the municipal corporation has general power to contract, and the statute does not indicate indispensable special requirements as to the mode, the municipal corporation may be held liable upon an implied contract for that which it had the general power to contract, but where any provision of law enacted as a matter of public policy,—such as a requirement for competitive bidding,—exists, a contract not in compliance with the statute must be treated as void, —*and this, although no provision makes the violation of the statute a crime.*

\* \* \* “undoubtedly a school board, like a municipal corporation, may, under some circumstances, be held liable upon an implied contract for benefits received by it, such rule of implied liability is applied only in those cases where the board or municipality is given the general power to contract with reference to a subject matter and the express contract which it has assumed to enter into in pursuance of this general power is rendered invalid for some mere irregularity or some invalidity in the execution thereof; where, however, by statute the power of the board or municipality to make

a contract is limited to a certain prescribed method of doing so and any other method of doing it is expressly or impliedly prohibited, no implied liability can arise for benefits received under a contract made in violation of the particularly prescribed statutory mode."

\* \* \* "where the statute prescribes the only mode by which the power to contract shall be exercised the *mode* is the *measure* of the power. A contract made otherwise than as so prescribed is not binding or obligatory as a contract *and the doctrine of implied liability has no application in such cases.*"

Reams v. Cooley, 50 Cal. Dec. 360; 152 Pac. Rep. 293, 294.

Plainly such statutes do not permit of exceptions. If they do the court could read out of the statute the legislative restriction in one case and uphold it in another. If this were true, the restriction would be utterly indefinite. The statute is too clear and plain for construction. This alleged \$3500 contract fell as clearly within its terms as would have a \$5000 contract with Wilsey.

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## VI.

### GENERALLY, DAMAGES ARE NOT RECOVERABLE FOR THE BREACH OF AN ILLEGAL CONTRACT.

"A statute prohibiting the making of contracts except in a certain manner *ipso facto* makes them void, if made in any other way."

9 Cyc., 476.

"IV. STATUTES REGULATING DEALINGS IN ARTICLES OF COMMERCE. Statutes *regulating* dealings in articles of commerce have been held

to render sales void which contravene their provisions, as for example statutes requiring weights and measures to be approved and sealed by the proper officer, or requiring goods to be *inspected*, branded, labeled, tagged, weighed, stamped, etc.”

9 Cyc., 479.

Such invalidity cannot be waived.

“V. WAIVER OF STATUTORY PROVISIONS BY AGREEMENT. A person may lawfully waive by agreement the benefit of a statutory provision. But there is an imputed exception to this general rule in case of a statutory provision whose waiver would violate public policy expressed therein, *or where rights of third parties which the statute was intended to protect are involved.*”

9 Cyc., 480.

A prohibition cannot be evaded by indirection.

“It is well settled that one cannot do by indirection that which cannot be done directly. A contract entered into in fraud or evasion of the statute is equivalent to an open violation of it.”

Elliott on Contracts, Vol. II, sec. 675.

“In the light of these authorities the solution of the present question is not difficult. By the ordinance, *sale without a license* is prohibited under penalty. There is in its language *nothing which indicates* an intent to limit its scope to the exaction of a penalty, or to grant that a sale may be *lawful as between the parties, though unlawful as against its prohibitions*; nor when we consider the *subject-matter* of the legislation, is there anything to justify a *presumed intent* on the part of the lawmakers to relieve the wrongdoer from the ordinary



consequences of a forbidden act. By common consent the liquor traffic is freighted with peril to the general welfare, and the necessity of careful regulation is universally conceded. Compliance with those regulations by all engaging in the traffic is imperative; and it cannot be presumed, in the absence of express language, that the lawmakers intended that contracts forbidden by the regulations should be as valid as though there were no such regulations, and that disobedience should be attended with no other consequence than the liability to the penalty. There is, therefore, nothing in the language of the ordinance or the subject-matter of the regulations which excepts this case from *the ordinary rule, that an act done in disobedience to the law creates no right of action which a court of justice will enforce.*"

Miller v. Ammon, 145 U. S. 421; 36 L. ed. 762.

The Supreme Court, speaking of a statute of the State of Colorado prohibiting a corporation from doing business in that state until it had complied with certain conditions, said:

"It must be conceded that if the contract on which the suit was brought was made in violation of a law of the State, it cannot be enforced in any court sitting in the State charged with the interpretation and enforcement of its laws."

Cooper Mfg. Co. v. Ferguson, 113 U. S. 727, 733; 28 L. ed. 1138.

Where a statute both penalizes and prohibits and it deals with the preservation of corporate assets, a violation of it is unlawful and a contract violating it is void and no recovery can be had although con-

sideration has been parted with upon the faith of the alleged contract.

Vercoutre v. Land Co., 116 Cal. 410, 415.

“But when the restrictive policy of a law alone is in contemplation, we hold it to be a universal rule that it is unlawful to contract to do that which is unlawful to do.”

The Bank of the United States v. Owens,  
2 Pet. 527, 538; 7 L. ed. 508.

“There can be no civil right where there can be no legal remedy; and there can be no legal remedy for that which is itself illegal.”

The Bank of the United States v. Owens,  
2 Pet. 527, 539; 7 L. ed. 508.

The regulation may be of the essence of the statute:

“ \* \* \* It is quite evident that the statute was passed not only for the purpose of protecting *numerous parties who borrow money* but also the public against frauds committed on third persons, the real owners of goods, by pledging their property without their consent  
\* \* \* This, therefore, being the object and intention of the Legislature, *and the requisites being such as are to be performed at the time of, and previously to,* entering into the contract, I think the contract must be held void, notwithstanding, there are specific penalties for the omission of such requisites. The late case of Cope v. Rowlands is completely in point, and reviews all the preceding cases, beginning with Bartlett v. Vinor, which alone would be sufficient to determine the present case.”

Tindal, C. J., in

Ferguson v. Norman, 5 Bingham's New Cases  
85; 6 Scott 794; 1 Arn. 418; 8 L. J. C. P. 3;  
3 Jur. 10.

If there was doubt as to whether the state could make prohibitions and conditions operative against the management of the funds of a public service corporation after its business has been thoroughly established, there are a multitude of reasons and there is a vast amount of common experience which justify state regulation of the initial investment of the stockholders' moneys. Both the stockholder whose money is to be used and the public who are to be served are interested in at least that amount of regulation which will insure safe initial investment. There must have been some sound reason for the adoption of the act. Its provisions for protecting the funds of the company raised for construction purposes are much like those of the statutes of other states.

The scandal connected with the disbursement of a million dollars by the United Railroads, upon the Solano Irrigated Farms Company, the staying of the hand of the San Francisco, Oakland Terminal Railways, when it was entering into a power contract that meant loss to the company and its stockholders, and injury to the public;—these and a multitude of other incidents are fresh in the minds of the public as evidence that corporate management of a public utility may be mismanagement through ignorance, inexperience or dishonesty. Too many corporations have been started for the purpose of ruining stockholders, and with no regard

to the franchise exercised, and it was for the legislature to say whether some check should be imposed upon the use of the funds of stockholders of a public utility and to withdraw the power from inexperienced or experienced directors to use such funds for purposes which the railroad commission has not specified. Whatever blunders and mistakes such a commission might make at the outset, no one can question the present competency of the railroad commission of this state, or the beneficial results that have ensued even to the public utilities themselves from the exercise of its powers. The Public Utilities Act met a long felt want and it or a similar statute has found or will find its way in the statutes of every state. To apply its orders in one case and to refuse their application in another, is to destroy the effectiveness of the commission itself.

The defendant earnestly contends that it followed the only course that was proper to follow in repudiating the alleged contract; that there was no order of the railroad commission permitting the incurring of the alleged obligation; that plaintiff and his associate knew it; that it could be urged in any case that there are *some* reasons why the statute should not apply; and that if the statute could be held inapplicable to this case it could only by holding that the court may review and annul the action of the commission; that the learned trial court erred in holding that the statute and order



did not apply to this case, and that its judgment ought to be reversed.

Dated, San Francisco,  
March 8, 1916.

Respectfully submitted,

A. C. HUSTON,

BLACK & CLARK,

*Attorneys for Plaintiff in Error.*

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No. 2670

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SACRAMENTO VALLEY ELECTRIC RAILROAD  
COMPANY (a corporation),

*Plaintiff in Error,*

VS.

TAGGART ASTON,

*Defendant in Error.*

BRIEF FOR DEFENDANT IN ERROR.

JACOB M. BLAKE,

*Attorney for Defendant in Error.*

Filed this.....day of March, 1916

FRANK D. MONCKTON, *Clerk.*

By.....*Deputy Clerk.*

Filed  
MAR 27 1916  
Frank D. Monckton  
Clerk



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## BRIEF FOR DEFENDANT IN ERROR.

### Statement.

This cause is before the Court solely upon a single question of law, viz: whether the contract alleged in the first cause of action in the complaint is illegal upon the ground that it is a prohibited contract under the provisions of the Public Utilities Act of California in general, and the orders of the California Railroad Commission affecting the plaintiff-in-error in particular.

The order settling the bill of exceptions certifies

“that the foregoing bill of exceptions contains all of the evidence in the cause relating to the question presented by the exceptions noted by the defendant, the defendant making no point



that the evidence is insufficient to sustain the finding that the contract relied upon was entered into and breached as pleaded in the complaint in the first count, but claiming and reserving the point that the contract was illegal and not authorized by the order of the Railroad Commission”;

and the bill was settled pursuant to the following stipulation:

“The foregoing bill of exceptions is correct and it is agreed the same may be settled and allowed in accordance with the certificate thereto attached” (Trans. pp. 90-91).

This view of the record will render it unnecessary for us to do more than to give a bare outline of the facts of the case. The plaintiff in error, a railroad company, was organized on May 4, 1912, and became a public utility corporation as defined by the Public Utilities Act of California. On August 13, 1912, the Railroad Commission of California made its primary order authorizing the issuance of 30,000 shares par value of \$3,000,000 preferred stock and 7,500 shares, par value \$750,000, of common stock; the preferred stock was to be sold for par with an allowance of 25 per cent for commissions. The projected main line of the road was to run from Red Bluff southerly through the Sacramento valley by way of the town of Dixon, 150 miles or thereabouts to the most convenient junction with the Oakland, Antioch and Eastern Railroad in Solano County; a branch line in Yolo County, about 11 miles in length, was also provided for, making a

total contemplated mileage for the system of about 160 miles. Among other things the order recited:

“In order that reasonable assurance be had that the actual construction of this road will not be entered upon before there is sufficient money in hand to warrant proceeding with the scheme, there should be \$750,000 paid in on stock before any construction work begins or any expense other than that incident to the sale of stock is incurred by the company, and title to rights of way should be taken conditioned on the receipt by the company of the above amount of money.

In order that the Commission may assure itself at all times that the money received from the sale of this stock is being properly expended for the purposes named, we recommend that in addition to a compliance with Order No. 24, applicant be ordered to submit to the Commission for its approval before the execution thereof, all general contracts exceeding the amount of \$1000.”

The formal order itself provided the manner and form in which both the preferred and common stock should be sold and stated that:

“Construction of the road shall not be entered upon nor liability created, nor money paid out except for commissions as aforesaid until there shall be in the hands of the company from the sale of stock \$750,000”.

The order then continued in the following words:

“The proceeds from the sale of said preferred stock shall be used for the following purposes: For the purchase of material and rolling stock and the construction of an electric railroad in certain territory, all as set out in

detail in the application and exhibits attached thereto and filed therewith.

“Said company shall keep separate, true, and accurate accounts, showing the receipt and application in detail of the proceeds of the sale or exchange of said stock hereby authorized to be issued, and on or before the twenty-fifth day of each month the company shall make a verified report to the Commission in accordance with the Commissioner’s general order No. 24, stating the sale or disposal of such stocks during preceding month, the terms and conditions of such sale or other disposition, the moneys or property realized therefrom and the use and application of such money or property. And, in addition thereto, said company shall submit to this Commission for its approval the form of all contracts for the sale or exchange of stock, and before the execution thereof all contracts for grading, bridging, track, including materials and labor, equipments of all kinds and all materials, labor and property involving costs in excess of \$1,000.

“The authority hereby given to issue such stock shall apply only to stock issued by said company on or before the first day of August, 1913.

“The foregoing opinion and order are hereby approved and ordered filed as the opinion and order of the Railroad Commission of the State of California” (Trans. pp. 57-66).

Immediately upon its organization, the company set about the preparation of the various details of management necessary to commence to do business. It elected its president and secretary, employed counsel, leased an office in a prominent office building in the city of San Francisco, and em-

ployed a sufficient office force to transact the business of the company (Trans. p. 69).

Operating under the order of August 13, 1912, the company, up to August 31, 1913, had received \$416,401.55 on account of the sale of its preferred stock, \$212,290 of which was cash and \$204,111.55 was represented by promissory notes, and *had paid out* \$80,290.20 on account of commissions on the sale of said capital stock, and for expenses in conducting its business, the sum of \$40,468.42. It was also shown that "*through the activities of the officers and agents of the company* 90 per cent of the necessary right of way" had been given free to the company (supplemental opinion and order of R. R. Commission, *dated Sept. 27, 1913*, Trans. pp. 67-75). The order just referred to ratified the payment on account of general expenses in said sum of \$40,468.42; and the further order was made upon the company, that it should submit, for the approval of the Commission, a detailed statement, "*showing general expenses incurred*" from August 31, 1912 (the date of the first order) to September 27, 1913 (the date of the second order). The order then continues in the following words and figures:

"From and after the date of this order, and until the further order of this Commission, said company is authorized to expend for general expenses, similar to those detailed in the statements heretofore made and just above referred to, an amount not to exceed \$1,000.00 per month, provided that said \$1,000.00 shall not be taken from cash now in the hands of applicant, but shall be realized from promissory notes hereafter taken for the sale of stock.



“Said company shall keep separate, true and accurate accounts showing the receipt and application in detail of the proceeds of the sale or exchange of said stock hereby authorized to be issued, and on or before the twenty-fifth day of each month the company shall make a verified report to the Commission in accordance with the Commissioner’s General Order No. 24, stating the sale or disposal of such stocks during the preceding month, the terms and conditions of such sale or other disposition, the moneys or property realized therefrom *and the use and application of such money or property. And in addition thereto said company shall submit to this Commission for its approval the form of all contracts for the sale or exchange of stock, and before the execution thereof, all contracts for grading, bridging, track, including materials and labor, equipments of all kind and all materials, labor and property involving costs in excess of \$1,000.00.*

“The authority hereby given to issue such stock shall apply only to stock issued by said company within the time from the first day of August, 1913, to the first day of August, 1914.

“The foregoing opinion and order are hereby approved and ordered filed as the opinion and order of the Railroad Commission of the State of California.”

On December 30, 1913, another and second supplemental opinion and order was rendered and made by the Railroad Commission upon the application of the defendant company to allow payments on account of *current expenses* in the sum of \$1,250 per month, instead of \$1,000 per month for the approval of certain expenses incurred by and on behalf of the company both before and after incorporation, concerning which the opinion says:

“In the supplemental order of September 27, 1913, applicant was ordered to file a detailed statement of unpaid obligations not included in the statement of expenses covering the period up to August 31, 1913. Such detailed statement has now been made, showing a total of \$1,647.49, and request is made that the amounts therein contained be allowed to be paid. An examination of these items shows that they are proper items of expense, and therefore should be allowed.

“Prior to and for a time after the incorporation of applicant, certain men were active in the promotion of the railroad project for which applicant was incorporated. During such activity they expended, on behalf of the project, various sums, totaling \$3,159.55, which they now ask this Commission to allow applicant to pay in par of preferred stock.

“It is evident that these men did expend from their own resources the amounts named, and the evidence shows that the board of directors of applicant has allowed these various sums as constituting obligations in favor of these men. Therefore, I think this request should be granted and applicant be authorized to issue preferred stock at par in settlement” (Trans. pp. 83-89).

A short time before the supplemental order of September 27, 1913, was made, the plaintiff in error entered into negotiations with Mr. W. J. Wilsey of Portland, Oregon, looking toward an agreement with him to undertake upon his part the sale of the bonds of the company in Europe. As Mr. Wilsey was leaving for England about October 1, 1913, he desired a preliminary engineering report of an engineer engaging the con-

fidence of both himself and his English clients, upon the project, and hence the employment of Mr. Aston under the terms of the proposition contained in the letter of September 22, 1913 (Trans. pp. 24, 25). This contract was breached by a repudiation of it on the part of the plaintiff in error and notice thereof given to Mr. Aston in a letter from its president, dated October 1, 1913 (Trans. pp. 27, 28). The Court found the contract and its breach as aforesaid, disallowing the last \$1,000.00 included in the full contract price of \$3,500.00 for the services, because Mr. Wilsey on October 1, 1913, was still on this side and *in natura rerum*, the final payment could not become due since it was conditioned on the company's "hearing from Mr. Wilsey, from London, that the matter is receiving favorable consideration."

Although the findings are not before the Court for review, counsel here, as in the lower Court, strangely contend for some connection between the contemplated contract between the company and Mr. Wilsey for the sale of the bonds in Europe and its contract with Mr. Aston for his engineering services; the claim seeming to be that there was to be but one contract covering one transaction. That there were two contracts to be entered into is put beyond doubt by the telegram of Mr. Donohoe, the president of the company, to Mr. Wilsey, dated September 22, 1913, the date of the company's written acceptance of the Aston contract, as follows:

“Your proposition acceptable directors desire personal conference prior to execution of formal agreement, have made satisfactory arrangements with Mr. Aston who has commenced on report. When can you be here on way to England” (Trans. p. 54).

Mr. Aston replied by letter to Mr. Donohoe’s renunciation of the contract of September 22, and, after saying that he had already made considerable progress upon the report, stated:

“I shall be glad to convenience you in any way possible that may not injuriously prejudice my position in the matter” (Trans. p. 28).

As a matter of fact on a whole examination of the transcript, it will be shown that, in so far as it was possible to do so without the active co-operation of the company, Mr. Aston fully performed his part of the contract, and the plaintiff in error used his report with Mr. Wilsey in London in order to further their interests there (Trans. pp. 36, 37). Its only excuse for refusing either to keep its agreement with him or recognize an obligation on a *quantum meruit* for services actually rendered has been the illegality of the contract, whether considered as express or implied, because of the lack of previous authorization by the Railroad Commission.

Before opening our argument it will be proper for us to say that, in our opinion, counsel both below and here in their opening brief have begged the question that is before the Court for decision:



that is to say, they have assumed the illegality of the contract between the parties and then they have urged the considerations of law that would render it unenforceable. It will, therefore, not be our purpose to attack their men of straw, but, on the other hand, we will proceed immediately with our attempt to show that the contract alleged in the first count of our complaint is valid in law.

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### Argument.

Before undertaking to characterize the quality, quantity and the particular effect of the orders of the Railroad Commission of California, in the case at bar upon the contract pleaded in the first count of the complaint, it will be necessary to gain first some idea of the character of the change wrought in the organic law of California by the underlying amendments to the constitution creating the Railroad Commission and providing for the later enactment of the legislature known as the Public Utilities Act. This has been rendered less difficult by reason of the decision of the Supreme Court of California in the case of *Pacific Telephone etc. v. Eshleman*, 166 Cal. 640.

The elaborate opinion of Mr. Justice Henshaw is a compendium of legal learning and presents a grasp of constitutional principles, and of historical analogies, as well as of present day governmental and economic theories, that is entirely commensurate with the importance and reach of the question

before the Court for decision, viz.: the nature and scope of the governmental authority vested by law in the Railroad Commission of California. To arrive at the ultimate of such inquiry it became necessary for the court to determine, first: the legislative intent of the people of California as expressed in the constitutional amendment creating the Railroad Commission and defining its power; second: the nature and scope of the authority conferred upon the legislature to grant additional powers to the Commission, and third: the construction of the Public Utilities Act, in granting such additional powers. Since all of the foregoing questions were before the Court for decision, and the opinions of the judges contain nothing in the way of *obiter*, we may safely say that the decision in this case lays the bedding stone in the structure which must in the future be raised by the Court in the process of construing and interpreting the legislative-administrative-judicial *pronunciamentos*,—in the form of orders,—of the Railroad Commission. Strange as is the idea to a legal mind trained through an historical contact with the traditions growing out of the development through a thousand years of Anglo-American common law, to commence at the beginning it is necessary to realize that in the organization of the Railroad Commission the people of the State of California have conferred plenary legislative, administrative and judicial power upon a board composed of five members.

The grant of powers to the Railroad Commission by section 22 of article XII of the constitution provides as follows:

“Said commission shall have the power to establish rates of charges for the transportation of passengers and freight by railroads and other transportation companies, and no railroad or other transportation company shall charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or freight, or for any service in connection therewith, between the points named in any tariff of rates, established by said commission than the rates, fares and charges which are specified in such tariff. The commission shall have the further power to examine books, records and papers of all railroad and other transportation companies; to hear and determine complaints against railroad and other transportation companies; to issue subpoenas and all necessary process and send for persons and papers; and the commission and each of the commissioners shall have the power to administer oaths, take testimony and punish for contempt in the same manner and to the same extent as courts of record; the commission may prescribe a uniform system of accounts to be kept by all railroad and other transportation companies.

*“No provision of this constitution shall be construed as a limitation upon the authority of the legislature to confer upon the railroad commission additional powers of the same kind or different from those conferred herein which are not inconsistent with the powers conferred upon the railroad commission in this constitution, and the authority of the legislature to confer such additional powers is expressly declared to be plenary and unlimited by any provision of this constitution.”*

By an amendment adopted at the same time section 23, article XII of the constitution was amended to confer upon the Railroad Commission power and jurisdiction to regulate and control all public utilities. After enumerating the enterprises, including railroads, which were declared to be public utilities, it was provided that all should be

“subject to such control and regulation by the railroad commission as may be provided by the legislature,” \* \* \*

*“The railroad commission shall have and exercise such power and jurisdiction to supervise and regulate public utilities, in the State of California, and to fix the rates to be charged for commodities furnished, or services rendered by public utilities as shall be conferred upon it by the legislature, and the right of the legislature to confer powers upon the railroad commission respecting public utilities is hereby declared to be plenary and to be unlimited by any provision of this constitution.”*

Pursuant to the grants of power above set forth, the legislature of California passed the Public Utilities Act, which particularly provides for the organization of the Commission, the grant of large powers over all public utilities, heavy penalties in the way of fines upon public utilities violating orders of the Commission, the power to punish for contempt. It also contains the following legislative declaration:

“If any section, sub-section, sentence, clause or phrase of this Act is for any reason held to be unconstitutional, such decision shall not affect the validity of the remaining portions of this act. The legislature hereby declares that



it would have passed this act, and each section, subsection, sentence, clause and phrase thereof, irrespective of the fact that any one or more other sections, subsections, clauses or phrases be declared unconstitutional.”

The provisions of the Public Utilities Act which are pertinent and necessary to the construction and interpretation of the orders of the Railroad Commission in the case at bar will be found in section 52. The title of the section is given as follows:

“Approval of Stocks and Stock Certificates and Bonds, Notes and Other Evidences of Indebtedness”.

Subdivision (a) of section 52 contains the declaration that the power to issue the foregoing “is a special privilege”, to be exercised as provided by law and under such rules and regulations as the Commission may prescribe”. Subdivision (b) provides for the method by which the securities of the public utility may be issued, the hearing before and the investigation by the Commission in regard thereto, and, particularly, that

“No public utility shall, without the consent of the Commission, apply the issue of any stock or stock certificate, or bond, note, or other evidence of indebtedness, or any part thereof, or any proceeds thereof, to any purpose not specified in the commission’s orders, or to any purpose specified in the Commission’s order in excess of the amount authorized for such purpose, or issue or dispose of the same on any terms less favored than those specified in such order or a modification thereof.”

Subdivision (f) provides, among other things, that one.

“who, directly or indirectly, knowingly applies, or causes or assists to be applied the proceeds or any part thereof, from the sale of any stock or stock certificates, or bond, note, or other evidence of indebtedness to any purpose not specified in the commission’s order, or to any purpose specified in the commission’s order in excess of the amount authorized for such purpose, \* \* \* shall be guilty of a felony.”

Within the foregoing excerpts taken from the various organic acts which go together to create and define the power of the Railroad Commission of California is to be found those elements of unlimited governmental control which have never heretofore in the history of England or America been lodged in any one department of government, except the English Parliament; and which, as has been justly said, make the enactments, if not anomalous, certainly *sui generis*, in the broadest possible conception of that term.

The scope and effect of the constitutional amendments as defined by the Supreme Court of California show the intent not only to grant unlimited legislative, administrative and judicial power to the Railroad Commission, as an organization of five members, but also the deliberate purpose to withdraw from the Courts of the State practically all jurisdiction to review the orders of the Commission, thereby establishing for such orders the legislative-judicial effect of special legislation and star-

chamber decrees combined: a purpose so clearly foreign to the ideas of Anglo-American jurisprudence as to justify the belief, if it were not otherwise patent upon the face of this legislation, that it was conceived by minds as wholly unfamiliar with English constitutional history as with the history of English law. Whatever may have been the foreign and alien influences, steeped in considerations of absolutism, that produced this hybrid legal "sport", we still will hazard the hope that there remains, as a part of the processes of the Common Law, sufficient juices representative of the spirit of liberalism and personal freedom to dissolve and digest the outer shell of the Railroad Commission law of California, and release its kernel with all its proper nutritive effects upon the body politic.

The power and authority which the legislature of California has granted to the Railroad Commission over public utilities is the same unlimited power granted to the legislature under the constitutional amendments, to confer such "additional powers of the same kind or different from those conferred herein which are not inconsistent with the powers conferred upon the railroad commission in this constitution." This is effected, in part at least, by the provision in section 67 of the Public Utilities Act limiting the right of review by the Supreme Court of the orders of the Railroad Commission, and providing that it

"shall extend no further than to determine whether the commission has regularly pursued its authority, including the determination of

whether the order or decision under review violates any right of the petitioner under the constitution of the United States or of the State of California.”

It is also provided by the same section that

“The findings and conclusions of the commission on questions of fact shall be final and shall not be subject to review; such questions of fact shall include ultimate facts and the findings and conclusions of the commission on reasonableness and discrimination.”

By the construction which has been given to the amendments creating the Railroad Commission and defining its power, and granting the legislative authority to confer upon it

“additional powers of the same kind or different,”

it has been held that the orders of the Railroad Commission, when acting within the scope of power thus conferred by the legislature, are limited only by the Constitution of the United States.

This is the conclusion definitely reached by the Supreme Court of California in the case of *Pacific Telephone etc. Co. v. Eshleman* upon the meaning and effect of the organic enactments which are set forth above. The Court said:

“Two constructions of the constitutional provisions above quoted have been presented to the consideration of the court. First, that the constitution itself has designedly conferred upon the legislature the fullest possible powers to legislate concerning public utilities through the board of railroad commissioners; that it was intended that upon the board of railroad



commissioners should be conferred whatsoever powers the legislature saw fit, and that nothing in any other provisions of the constitution should hamper the legislature in so doing; that the board of railroad commissioners itself was especially exempt from the operation of the recall, to the end that it might exercise such powers as the legislature might confer upon it without possible embarrassment; that the railroad commission differs from all other officers of the state in that the legislature alone, and not the people, is authorized to unseat any of its members (const. art. XII, sec. 22); that this constitutional meaning is precisely and aptly evidenced by section 22, when it declares that 'No provision of this constitution shall be construed as a *limitation upon the authority of the legislature* to confer upon the railroad commission *additional powers* of the same kind *or different* from those conferred herein which are not inconsistent with the powers conferred'; that there is the fullest possible grant of authority, to confer all kinds of additional powers, with the sole limitation that whatever additional powers may be vested by the legislature in the commission shall not be inconsistent with the constitutional powers conferred; that this means and can only mean that the legislature may not curtail any of the powers vested by the constitution in the railroad commission, but that the legislative authority, to confer any kind of additional powers is, and is expressly declared to be, 'plenary and unlimited by any provision of this constitution'; further, that the people in enacting these constitutional amendments designedly and deliberately did this thing, to the end that the railroad commission thus constituted should have its labors unvexed and their results untrammelled by the courts of the state; that the legislature itself adopted this view of the Public Utilities Act, which was framed with much care

and passed with due deliberation; that this is shown in many passages of the act itself, not alone in that which deprives the superior courts of their constitutional jurisdiction, but as well in that which deprives this court of a jurisdiction which otherwise it would have. For it has universally been held by all courts, and specifically by the Supreme Court of the United States, in reviewing the orders of the interstate commerce commission—a kindred board to our railroad commission—that the question of discrimination and reasonableness is always subject to judicial review. (*Interstate Commerce Commission v. Northern Pac. R. R. Co.*, 222 U. S. 541, (56 L. Ed. 308, 32 Sup. Ct. Rep. 108).) Our Public Utilities Act in terms declares that the determination of the commission shall not be open to review upon the subject of ‘reasonableness and discrimination.’ When the legislature vested in this court alone this limited power of review and included therein the duty by this court to determine whether a petitioner’s constitutional rights were violated, it meant, so far as the constitution of the state is concerned, only those constitutional rights of which the petitioner had not been deprived by legislative enactment. While, so far as the constitution of the United States is concerned, it being a law paramount in dignity and force even to the state constitution, the state, not having the power to deny a petitioner the protection of the constitution of the United States, simply made recognition of that fact.

“This view is certainly borne out by the language of the constitution itself, by the action of the legislature under it, and by the position taken by Mr. Thelen, a member of and representing the railroad commission, at the oral argument. The grant of power to the legislature being that it may confer upon the railroad commission any additional power that it sees fit, the limitation upon this grant being merely

that the powers shall not be inconsistent with those conferred by the constitution itself, the declaration of the constitution being that the legislature's power is plenary and unlimited, it necessarily and conclusively follows that the legislature may confer upon the railroad commission in the matter of the management and control of public utilities, in making of its orders and decrees, in the punishment for the violation of its orders and decrees (all of which subject matters are cognate and germane to and not inconsistent with the constitutional powers conferred) whatsoever authority it may see fit, and that that authority may be exercised without the slightest restraint; every constitutional protection and guaranty, civil and criminal, which the constitution has accorded to all other kinds of property and the owners thereof, are or may be denied to this class of property and its owners. \* \* \*

“The second construction of these constitutional provisions is one which would limit the power which the constitution authorized the legislature to confer upon the railroad commission strictly to the matter of ‘supervising and regulating’ public utilities. Thus all ‘additional and different’ powers which the legislature is authorized to confer upon the commission must be powers within this defined and circumscribed limit. The learned attorney for the railroad commission in his printed brief recedes from the position which he took upon oral argument, and contends for this latter construction, basing his contention upon ‘further study of the section and conference with some of the men who drew the section and who were instrumental in having it submitted to the legislature and having it adopted by the people of the state.’ But this court in construing a constitutional enactment is limited to the language of the enactment itself. In this instance, as in all others, we may not be gov-

erved by what the framers of the amendment meant to say. We are of necessity controlled by what they did say. But, so far as respondent is concerned, the concession yields too much, for, under the first view, the legislature, acting in the matter without any constitutional restraint, was perfectly justified in conferring any powers that it saw fit upon the railroad commission. It could have declared that its decisions were not reviewable by any court of the state, and, of course, having that power, it could limit the scope of review to any particular court, and, still further, limit the hearing before that court. This is precisely what the legislature has done under the sanction of the constitution as first construed. If, however, the view last advanced by the railroad commission is to prevail and the legislative power is pent up and confined by matters of regulation only, then it necessarily follows that its clearly expressed attempt to deprive the superior court of all jurisdiction, its clearly expressed attempt to limit and circumscribe the jurisdiction of this court in some particulars, its further attempt to enlarge the scope of the writ of review, its declared intent to deprive all the courts of the state of the power to say whether a specific order of the commission is reasonable or discriminatory, are one and all violative of state constitutional provisions. More important still, many of the powers expressly conferred upon the commission by sections 40 and 41, giving to the railroad commission the unrestricted right based upon public convenience and necessity, to compel a physical surrender of the properties of one public utility for use by another, upon 'a reasonable compensation and reasonable terms and conditions for the joint use' fixed by the railroad commission itself, themselves do violence to article I section 14 of the state constitution, which forbids such a taking or injury without compensation fixed



by a jury, first made and paid. For the taking of property devoted to a public use from the control of the owners, even though in so doing it be devoted to another public use, is a taking of property within the meaning of the constitution. (*Chicago etc. R. R. Co. v. Chicago*, 166 U. S. 226 (41 L. Ed. 979, 17 Sup. Ct. Rep. 581).)

“In view of these considerations we regard the conclusion as irresistible that the constitution of this state has in unmistakable language created a commission having control of the public utilities of the state, and has authorized the legislature to confer upon that commission such powers as it may see fit, even to the destruction of the safeguards, privileges, and immunities guaranteed by the constitution to all other kinds of property and its owners. And while, under our republican form of government (a form of government under which the three departments — administrative, executive and judicial — have in the past one and all been controlled by the limitations of a written constitution (*In re Duncan*, 139 U. S. 449, (35 L. Ed. 219, 11 Supt. Ct. Rep. 573)), it is perhaps the first instance where a constitution itself has declared that a legislative enactment shall be supreme over all constitutional provisions; nevertheless this is but a reversion to the English form of government which makes an act of parliament the supreme law of the land. It was at one time argued as to such acts of parliament that while not otherwise invalid they would be decreed invalid if ‘contrary to natural justice or to natural right.’ But as this determination itself involved a resort to the courts and thus made the decision of the courts to that extent superior to the law of parliament, the present day jurisconsults are agreed that an act of parliament is not controlled by natural right or justice, but is controlled solely by what is deemed to be expedient and wise to the law-making power itself. (Bryce’s Ameri-

can Commonwealth, chap. 23.) So, here, the State of California has decreed that in all matters touching public utilities the voice of the legislature shall be the supreme law of the land."

The orders of the Railroad Commission, then, must be treated as paramount and supreme legislative enactments, of the same dignity as an Act of Parliament; and the courts of the land, state and federal, despite the habits of mind of its judges to apply fundamental checks upon arbitrary, unreasonable, or unconstitutional exercise of governmental power, must limit the exercise of their judicial functions solely to what is allowed by the sound canons of legal interpretation. We must look then to English precedents alone to determine to what extent a court may go to control the meaning and the effect to be given to a statute or an order of an administrative body in such a case. The allusion which Justice Henshaw makes to the present day agreement of juriconsults that an Act of Parliament is not to be controlled by the ideas of the Court as to what constitutes natural right and justice, but "is controlled by what is deemed to be expedient and wise to the law making power itself", comes to us from Justice Willes in expressions used by him in the decision of *Lee v. Bude and Torrington Junction Rail Co.*, L. R. 6 C. P. 576, at 582. He said:

"It was once said,—I think in *Hobart* (in *Day v. Savage*, Hob. 87, 'Even an Act of Parliament, made against natural equity, as to make a man judge in his own case, is void in

itself; for *jura naturae sunt immutabilia*, and they are *leges legum*')—that, if an Act of Parliament was to create a man judge in his own case, the Court might disregard it. That *dictum*, however, stands as a warning, rather than an authority to be followed. We sit here as servants of the Queen and the legislature. Are we to act as regents over what is done by Parliament with the consent of the Queen, Lords and Commons? I deny that any such authority exists. If an Act of Parliament has been obtained improperly, it is for the legislature to correct it by repealing it; but so long as it exists as law, the Courts are bound to obey it. The proceedings here are judicial, not autocratic, which they would be if we could make laws instead of administering them."

This, by no manner of means, prevents courts from determining what particular effect shall be given to Acts of Parliament in order to give force to the legislative intent; and we find that many sound canons of legal interpretation have been brought into being for the purpose of aiding courts to arrive at that intention. The Golden Rule of statutory construction is a primary one, and has been stated as follows:

"The grammatical and ordinary sense of the words is to be adhered to, unless it would lead to some absurdity, or some repugnance or inconsistency with the rest of the statute in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity, repugnance and inconsistency, but no further."

Justice Burton, in *Warburton v. Loveland*, 1 Hudson & B Irish Cases, 623, at p. 648, states the rule as follows:

“I apprehend it is a rule in the construction of statutes, that, in the first instance, the grammatical sense of the words is to be adhered to. If that is contrary to, or inconsistent with any expressed intention, or declared purpose of the statute, or if it would involve any absurdity, repugnance, or inconsistency, the grammatical sense must then be modified, extended, or abridged, so far as to avoid such inconvenience, but no farther.”

See also the same point:

*Perry v. Skinner*, 2 M. & W. 471, at p. 476;

*Abley v. Dale*, 11 C. B. 378, at p. 391;

*Waugh v. Middleton*, 8 Ex. 352, at p. 357.

The following is also pertinent:

“The meaning of particular words in an Act of Parliament to use the words of Abbott, C. J. in *Rex. v. Hall* (1822), 1 B. & C. 123, at p. 136), ‘is to be found not so much in a strict etymological propriety of language, nor even in popular use, as in the subject or occasion on which they are used.’”—*The Lion* (1869), L. R. 2 P. C. 525, at p. 530; 38 L. J. Ad. 51, at p. 54, Lord Romilly, M. R., delivering the judgment of the Judicial Committee.

“There is always some presumption in favour of the more simple and literal interpretation of the words of a statute, or other written instrument.

“The more literal construction ought not to prevail if (as the Court below has thought) it is opposed to the intentions of the legislature, as apparent by the statute; and if the words are sufficiently flexible to admit of some other



construction by which that intention will be better effectuated.” *Caledonian Rail. Co. v. North British Rail Co.* (1881), 6 App. Cas. 114, at pp. 121, 122, Lord Selborne, L. C. (cited and followed by Jessel, M. R., in *Ex parte Walton* (1881), 17 Ch. D. 746 at pp. 750, 751; 50 L. J. Ch. 657, at p. 659; and by Chitty, J., in *Spencer v. Metropolitan Board of Works* (1882), 22 Ch. D. 142, at pp. 148, 149.”

An important rule of construction is one that operates to restrict general language in a statute and has been stated as follows, by Lord Herschell in the case of *Cox v. Hakes*, 15 App. Cas. 506, at p. 529:

“It cannot, I think, be denied that, for the purpose of construing any enactment, it is right to look not only at the provision immediately under construction, but at any others found in connection with it, which may throw light upon it, and afford an indication that general words employed in it were not intended to apply without some limitation.”

See also the expression of the Lord Chancellor (Halsbury) upon the same point, *Id.* at p. 518, and of Lord Esher, M. R., in *re Brockelbank*, 23 Q. B. D. 461, at pp. 462, 463.

Courts will apply the same rule of liberal construction in order to prevent injustice. Where the language of a statute is doubtful or obscure, it may, if susceptible of it, be modified or varied in order to avoid a manifest injustice.

As said by Brett, M. R., in *The Queen v. Overseers of Towbridge*, 13 Q. B. D. 339 at p. 342:

“If an enactment is such that by reading it in a sense which it can bear, although not exactly its ordinary sense, it will produce no injustice, then I admit one must always assume that the legislature intended that it should be so read as to produce no injustice.”

See also

Hill v. East and West India Dock Co., 9 App. Cas. 448, at p. 456;

Railton v. Wood, 15 App. Cas. 363, at p. 367.

We also find this language of Lord Escher, in Gowan v. Wright, 18 Q. B. D. 201, at p. 204, to be very interesting with reference to the case at bar:

“Is there, then, any general rule of construction applicable to such a proviso which enables us to limit the meaning of the words so as to prevent the defendant from doing what he seeks to do? I find in Maxwell on the Interpretation of Statutes, 1st ed. 1875, p. 184, in a section headed ‘Construction against impairing obligations, or permitting advantages from one’s own wrong; the principle resulting from the various authorities there collected expressed as follows: on the general principle of avoiding injustice and absurdity, any construction would be rejected, if escape from it were possible, which enabled a person to defeat a statute or impair the obligation of his contract by his own act, or otherwise profit by his own wrong.’”

We cite these cases from the English Courts not because the rules there laid down are different in degree or effect from those recognized by our own Courts, but because we are called upon to interpret a legislative enactment or administrative order

having the force and effect of a special Act of Parliament; and it is prudent, if not useful, to seek the protection of the precedents of courts which have never considered that they could exercise any constitutional power in the control of the scope and effect to be given to the legislative intent.

The same rules of statutory construction have been given effect to by the Supreme Court of the United States.

In *Henderson v. Mayor of New York*, 92 U. S. 259, at p. 268, it was said:

“In whatever language a statute may be framed, its purpose must be determined from its natural and reasonable effect.”

In *Yick Wo v. Hopkins*, 118 U. S. 356, at p. 373, the same Court speaks of the construed effect that it was forced to give to the city ordinance before it, and of the reasoning by which its meaning was arrived at, as “deductions from the face of the ordinance as to its necessary tendency and ultimate actual operation.”

In *United States v. Kirby*, 7 Wall. 482, at p. 486, the Court lays down the general rule which we contend for, as follows:

“All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language which would avoid results of this character. The reason of the law, in such cases, should prevail over the letter.”

See also

Lau Ow Bew v. U. S., 144 U. S. 47;

Church of Holy Trinity v. U. S., 143 U. S. 457;

Oates v. First National Bk., 100 U. S. 239;

United States v. Mooney, 116 U. S. 104.

The same court has also held that

“The operation of a statute may be restrained within narrower limits than its words import, when it is evident that the literal meaning of its language would extend it to cases which the legislature never designed to embrace in it.”

Brewer v. Blougher, 14 Pet. 178;

Petri v. Commercial Nat. Bk., 142 U. S. 644,  
at p. 650;

McKee v. United States, 164 U. S. 287.

One other rule of construction is important to be considered in the case at bar. It is a rule established in numerous cases by the Supreme Court of the United States that

“Practical construction of ambiguous statutes by governmental departments controls.”

United States v. Graham, 110 U. S. 219;

United States v. Alabama, G. S. R. Co., 142  
U. S. 615;

St. Paul M. & M. R. Co. v. Phelps, 137 U. S.  
528.

In construing doubtful phrases in a statute, the courts will adopt the legislature's interpretation of



its own language, afforded by a subsequent statute on the same subject.

Alexander v. Alexandria, 5 Cranch. 1;

Tiger v. Western Invest. Co., 221 U. S. 286.

As to the force of executive construction of a statute, see U. S. v. Cerecedo Hermanos y Co., 209 U. S. 338.

Applying these rules to the construction of the orders of the Railroad Commission of California effective at the time plaintiff entered into the alleged contract with the defendant company on September 22, 1913, and which became effective September 27 and December 30, 1913, we urge that no limitation whatever existed upon the power of the defendant, or was thought to exist by the Railroad Commission, to enter into such a contract for engineering services. That the order of August 13, 1912, is ambiguous, will not be denied by the defendant company. It contains a specific prohibition that

“Construction of the road shall not be entered upon nor liability created, nor money paid out except for commissions as aforesaid until there shall be in the hands of the company from the sale of stock \$750,000.”

Standing alone it is questionable even whether this provision would cut off the power of the company to contract for the character of services to be performed upon its behalf by the plaintiff, services necessary to be performed in advance of any substantial construction of the company's railroad

project. This Court will recognize that railroad systems of the size contemplated by the defendant's charter are built for the most part out of the proceeds of the sales of first mortgage bonds, to the promotion of the *issue and sale* of which *prior to construction*, services of the nature furnished by plaintiff are clearly requisite. Plainly, therefore, the prohibition in the order against the creation of liability and the paying out of money "except for commissions" refers *solely to construction contracts*.

It is to be always remembered that Mr. Aston's engineering services were employed by the plaintiff in error to aid in assisting the company to take its initial steps to obtain a preliminary offer in the bond markets of the world, which having been received would have become the subject of a contract that would necessarily have to be approved by the Railroad Commission. Certainly it cannot be the intention of counsel for the railroad company to lay itself open to the charge of unsophistication to a degree that would impute to them an ignorance of the necessity for secrecy concerning all the movements of its financial agents at this early period in its organization. The form taken by the concluding provision in the order of August 13, 1912, to the effect that,

"in addition thereto, said company shall submit to this commission for its approval the form of all contracts for the sale or exchange of stock, and before the execution thereof all contracts for grading, bridging, track, includ-

ing materials and labor and property involving costs in excess of \$1,000,"

must be credited to the Railroad Commission as having in mind the fact that there are some matters concerning which it cannot, as a matter of practical effect, tie the hands of newly organized railroad companies. Upon more general principles it could not be urged that the company's *power to contract* was cut off by the limitation first mentioned; for by the latter limitation, *it may contract for construction work up to the amount of \$1000 without the consent of the Commission*. The latter provision applies, then, to the particular kind of contracts enumerated, and we have a plain case for the application of the maxim, *expressio unius, exclusio alterius*.

Again, the power to contract and disburse moneys for other purposes than the payment of commissions on the sale of stock is to be implied from that part of the order requiring that

"said company shall keep separate, true and accurate accounts, showing the receipt and application in detail of the proceeds of the sale or exchange of said stock hereby authorized to be issued, and on or before the twenty-fifth day of each month the company shall make a verified report to the commission in accordance with the Commissioner's general order No. 24, stating the sale or disposal of such stocks during preceding month, the terms and conditions of such sale or other disposition, the moneys or property realized therefrom, *and the use or application of such money or property*."

the latter a wholly useless provision if the company

could not lawfully pay out other money than on account of commissions for the sale of its stock.

Again, it will not lie in the mouth of the defendant company to claim that the requirement of the order that

“The proceeds from the sale of said preferred stock shall be used for the following purposes (and no other): For the purchase of material and rolling stock and the construction of an electric railroad in certain territory, all as set out in detail in the application and exhibits attached thereto and filed therewith” (the foregoing brackets are ours),

was meant to postpone the company in the expenditure of its funds until it could enter upon the construction state of its contemplated operations, and it was not so construed either by the company for the recital in the supplemental opinion and order of September 27, 1913, is to the effect that it appears that “through the activities of the officers and agents of the company 90 per cent of the necessary right of way over which this line of railroad is to be constructed has been given free to the company”. Obviously it was employing right of way agents as well as stock selling agents. Here is an instance where the meaning of general terms must be restricted to give operation to exceptions which are as imperative as they are commonplace and natural.

So far we have dealt only with those intrinsic features of the orders of August 13, 1912, and of September 27, 1913, which conclusively, we think, negative the idea that the defendant company was



under an express prohibition to enter into the contract with the plaintiff herein. What shall be said then of the fact that by the construction placed upon the terms of the first order by the defendant company and by the Railroad Commission in its supplemental order of September 27, 1913, when under it the one incurred obligations in excess of \$40,000.00 and the other ratified the action of the former in so doing? We venture to say that the defendant company will have nothing that is sound, either in law or ethics, to oppose the proposition that this contemporaneous interpretation of these orders by both the company and Railroad Commission is conclusive and controlling as to the validity of the contract sued upon.

We have thus far discussed the internal evidences, contained in the order of August 13, 1912, to show that there could be no general intent on the part of the Commission to limit the power of the company to enter into so essential a contract as the one in question here. The external evidence presented by the conduct of both the company and the Commission more strongly sustains our contention. The company in the course of incurring \$40,000.00 and upwards of expenses, in addition to its obligations on account of commissions, confronted this same question as to the real meaning of the limitations contained in the order of August 13, 1912, and when in doubt it would have "*an informal consultation* with Commissioner Edgerton", and "ascertain his views". The Court very pointedly called atten-

tion to the fact that such a proceeding could not result in securing an authorization from the Railroad Commission itself (Trans. p. 77); and it is very obvious, of course, that Mr. Commissioner Edgerton should not be charged by the plaintiff in error here with knowingly violating the Public Utilities Act and the orders of the Railroad Commission itself, but that his action consisted in aiding to give merely an *interpretation thereof*. That this was the view taken by the company appears from the testimony of its counsel, Mr. A. C. Huston, at page 75 of the Record, where he says:

“My first impression and construction of that order (August 13, 1912) was that so far as current expenses were incurred, we had the implied right to it.

“THE COURT. I think your construction was correct.”

The Railroad Commission as a body has also confirmed the construction of the order of August 13, 1912, that we contend for. First, by ratifying the \$40,000.00 and upwards of expenses and obligations incurred between August 13, 1912, and the date of the first supplementary order, to-wit, September 27, 1913; Second, by its second supplementary order, dated December 30, 1913, authorizing the payment of certain detailed expenses totaling \$1,647.49 in one case and \$3,159.55 in another. *The latter was ordered paid by an issue of preferred stock to that amount at par.* This claim is in an amount comparable to that sued for here, and we respectfully urge that we are not entitled to any less consideration

than other creditors of the company have received whether our contract is considered to have been illegal because prohibited by, or valid under a proper interpretation of, the Commission's order.

It has always seemed incredible to us that the defendant should attempt to escape liability on the ground of the alleged illegality of this contract with the foregoing dilemma confronting it, for such a contention presents to the Court a request to construe the order of August 13, 1912, so as to imply a power on the part of the Railroad Commission that would be squarely in the teeth of the prohibition in the Fourteenth Amendment of the Constitution of the United States against denying the defendant in error in this jurisdiction "the equal protection of the laws". It is not requisite that the law, ordinance, or order should bear upon its face the manifest intention that it should operate unjustly, arbitrarily or oppressively in order to bring it within the condemnation of the law; *it is sufficient if, in its execution, such is its necessary tendency and ultimate actual operation.*

The limit of arbitrary governmental action, it is to be hoped, was set for all time in this country by Mr. Justice Matthews in the decision of the Supreme Court of the United States in *Yick Wo v. Hopkins*, 118 U. S. 356. We cannot forbear to include two passages from so notable a source; the one showing the spirit of our institutions with which the plan and methods of the Railroad Commission of California, as urged by the defendant

herein, are so greatly at odds; the other stating the considerations which make it impossible for such a method to be held lawful. Among other things, Mr. Justice Matthews said:

“When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power. Sovereignty itself is, of course, not subject to law, for it is the author and source of law; but in our system, while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people, by whom and for whom all government exists and acts. And the law is the definition and limitation of power. It is, indeed, quite true, that there must always be lodged somewhere, and in some person or body, the authority of final decision; and, in many cases of mere administration the responsibility is purely political, no appeal lying except to the ultimate tribunal of the public judgment, exercised either in the pressure of opinion or by means of the suffrage. But the fundamental rights to life, liberty and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws, so that, in the famous language of the Massachusetts Bill of Rights, the government of the Commonwealth ‘may be a government of laws and not of men.’ For, the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of



another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself. \* \* \*

The same principle has been more freely extended to the quasi legislative acts of inferior municipal bodies, in respect to which it is an ancient jurisdiction of judicial tribunals to pronounce upon the reasonableness and consequent validity of their by-laws. In respect to these, it was the doctrine that every by-law must be reasonable, not inconsistent with the charter of the corporation, nor with any statute of Parliament, nor with the general principles of the common law of the land, particularly those having relation to the liberty of the subject or the rights of private property."

After citing the case of *Baltimore v. Radecke*, 49 Md. 217, holding invalid an ordinance committing to the unrestrained will of a single public officer the power to notify every person owning a stationary steam engine in Baltimore to stop using it as a reasonable police regulation, the learned judge continues:

"This conclusion, and the reasoning on which it is based, are deductions from the face of the ordinance, as to its necessary tendency and ultimate actual operation. In the present cases, we are not obliged to reason from the probable to the actual and pass upon the validity of the ordinances complained of, as tried merely by the opportunities which their terms afford, of unequal and unjust discrimination in their administration. For the cases present the ordinances in actual operation, and the facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion that whatever may have been the intent of the ordinances

as adopted, *they are applied by the public authorities charged with their administration, and thus representing the State itself, with a mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the Fourteenth Amendment of the Constitution of the United States. Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discrimination between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.* This principle of interpretation has been sanctioned by this court in *Henderson v. Mayor, etc. of New York*, 92 U. S. 259 (Bk. 23 L. ed. 543); *Chy Luny v. Freeman*, 92 U. S. 275 (Bk. 23, L. ed. 550); *Ex parte Va.* 100 U. S. 339 (Bk. 25, L. ed. 676); *Neal v. Delaware*, 103 U. S. 370 (Bk. 26, L. ed. 267), and *Soon Hing v. Crowley* (*supra*)” (italics are ours).

Finally, it is worthy to note that we may claim the protection of the “equal protection” clause of the 14th Amendment on behalf of the plaintiff herein, a British subject, under the authority of this case.

**THE CONTRACT NOT NECESSARILY VOID EVEN IF PROHIBITED  
BY THE PUBLIC UTILITIES ACT.**

The legislature by sec. 52 of the Public Utilities Act has provided that, *without the consent of the Railroad Commission*, no public utility shall apply

the issue of stocks etc., or any proceeds thereof, to any purpose not specified in the Commission's order. It is perfectly clear that with the Commission's consent, express or implied, the issue of stock or the proceeds thereof may be applied to any purpose, whether specified or not by the Commission in its order. The absolute power vested by the constitution and laws of California in the Railroad Commission is not compatible with any other view of the situation. The Commission has plenary and unlimited power to supervise and regulate, among others, the railroad business of California; clearly, therefore, the penal clause of sec. 52 becomes effective only as and when it is called into action by the exercise of the discretion of the members of the Commission. It is one of the remarkable features of the Railroad Commission law of California that its power of special legislation, under the constitution of the state, extends to making criminal acts of parties under a special order in one case what may not be made criminal under a special order in an exactly similar case. Such is undoubtedly the law, however, and the only reason it may not by its special order create an *ex post facto* law is the happy circumstance that, as a state agency exercising legislative power, it is necessarily limited in that regard by the constitution of the United States. Therefore before it can be said that a certain contract between a public utility corporation and a third party is void by reason of being within the express

prohibition, or subject to the penal provisions, of a special order of the Commission, it is necessary to know what its intent was in those regards. In either case if the intent is not to penalize the act of the public utility company out of which the contract with the third party arises, or if it has consented to the contract expressly or by implication, the contract is not void for illegality. This rule, by analogy, must be carried over from cases arising with reference to contracts alleged to be in violation of legislative enactments, to contracts alleged to be in violation of the special orders of the Railroad Commission. Anomalous as is the condition that confronts us, we do not have to explore any unknown regions of the law, but may, with the utmost confidence, rely upon an unbroken line of common law precedents to vindicate the position for which we respectfully contend.

The law clearly is that not every prohibited contract is void or unenforceable. The unenforceability of illegal contracts depends almost if not entirely upon the application of the maxim *in pari delicto, conditio defendentis portior est*. It may be safely admitted that where a statute prescribes a penalty for an act, a contract involving the commission of the act is void even though the statute does not prohibit the contract or pronounce it void. In such cases the parties to the contract are always *in pari delicto*. As said in *Swan v. Swan*, 11 Serg. & R., 163:



“The test whether a demand connected with an illegal transaction is capable of being enforced at law, is whether the plaintiff requires aid of the illegal transaction to establish his case. If the plaintiff cannot open his case without showing that he has broken the law, the court will not assist him, whatever his claim in justice may be upon the defendant.”

But not every prohibited transaction is illegal and there is no presumption that a prohibited act is illegal; and this is true where the prohibited act may constitute a public offense. This rule was laid down in the interesting case of *Lewis v. Bright*, 4 E. & B. 917; 24 L. J. Q. B., 191. The case arose upon the breach of an agreement to exchange livings wherein the incumbents had mutually promised not to call upon the other to pay for dilapidations. The plaintiff sued the defendant as for breach of his common law duty to keep the rectory he had received from the defendant in repair. The defendant pleaded the agreement above stated and there was a verdict in his favor. The plaintiff then moved for a verdict *non obstante* upon the ground that such an agreement for the exchange of benefices was simoniacal under the statute of 31 Eliz., c. 6, which made it an offense to corruptly resign or exchange benefices. The Court held that

“if consistently with the plea a given state of things *can be imagined* free from the taint of simony, then the motion will not succeed.”

And after assuming various states or conditions of things in the particular case that would characterize a legal transaction, the court concluded:

“There is no benefit derived there by the arrangement, nor any improper benefit derived from the exchange of livings. Such a contract would not be corrupt, and it is perfectly consistent with the plea that such was the real state of things: if so we cannot make the rule absolute.”

Still asserting the position we have taken that no order of the Railroad Commission in force at the time of the transactions here involved contained, expressly or by implication, any inhibition upon the defendant company's entering in this contract, still the rule is that such a contract so entered into would not necessarily be void. It would not be void if it could be shown to be the intent of the Railroad Commission that it should not be so held; and it would not be so held if, taking all the facts into consideration, the order together with the penal provision of the Public Utilities Act limits the effect or declares the consequences which shall attach to the making of the contract, otherwise than by declaring it void. In other words while a contract involving the performance of an act expressly prohibited is void and the parties seeking its enforcement are necessarily *in pari delicto*, still a prohibition may be so declared that its object and purpose falls short of that of declaring a contract, made in derogation of it, void. Declaring what specific effects are to follow the violation of the public policy established by the statute is equivalent to excluding the idea of a more general

effect rendering all contracts affected by the wrongful act of the parties, void.

This rule is well stated in *Dunlop v. Mercer*, 156 Fed. 545, at 555:

“A general rule that an illegal contract is void and unenforceable is, however, not without exception. It is not universal in its application. It is qualified by the exception that where a contract is not evil in itself, and its invalidity is not denounced as a penalty by the express terms of or by rational implication from the language of the statute which it violates, and that statute prescribes other specific penalties, it is not the province of the court to do so, and they will not thus affix an additional penalty not directed by the law making power.”

Also as said in *Harris v. Runnels*, 12 How. 84-85, 13 Law. ed. 901:

“Whatever may be the structure of the statute in respect to prohibition and penalty, or penalty alone, it is not to be taken for granted that the legislature meant that contracts in contravention of it were to be void in the sense that they were not to be enforced in a court of justice. In this way the principle of the rule is admitted, without at all lessening its force, though its unconditional application to every case is denied. It is true that the statute, containing a prohibition and a penalty, makes the act which it punishes unlawful, and the same may be implied from a penalty without a prohibition; but it does not follow that the unlawfulness of the act was meant by the legislature to void a contract made in contravention of it. *When the statute is silent, and contains nothing FROM WHICH THE*

CONTRARY COULD BE INFERRED, a contract in contravention of it is void” (the italics are ours).

The last sentence above shows how narrow the rule is which declares a contract void as being in violation of the terms of an express statutory prohibition, or the terms of a penal statute. Only in those cases where no inference of a contrary legislative intent may be drawn, are such contracts to be held to be void. The rule for determining the legislative intent in such cases is given in *Dunlop v. Mercer*, *supra*, at p. 556, as follows:

“The true rule is that the court should carefully consider in each case the terms of the statute which prohibits an act under a penalty, its object, the evil it was enacted to remedy and the effects of holding contracts in violation of it void, for the purpose of ascertaining whether or not the lawmaking power intended to make such contracts void, and, if from all the considerations it is manifest that the legislature had no such intention, the contracts should be sustained; otherwise, they should be held void.”

Other cases to the same point are:

*Chattanooga R. Co. v. Evans*, 66 Fed. 809-15;  
*Hanover Nat'l Bank v. First Nat'l Bank*,  
 109 Fed. 421-26;

*Blodgett v. Lanyon Zinc Co.*, 120 Fed. 893-96-97;

*Gold Min. Co. v. Nat'l Bank*, 96 U. S. 640;

*Fritts v. Palmer*, 132 U. S. 282-89-93;

*Rutkowski v. Bozza*, 77 N. J. L. 724; 73  
 Atl. 502;



Pangborn v. Westlake, 36 Iowa 546;  
 Philadelphia Loan Co. v. Tower, 13 Conn.  
 249;

Roosman v. McFarland, 9 Ohio St. 369.

What we have said by way of construing the orders of the Railroad Commission, which here stand in the place of legislative enactments, as not inhibiting the contract here sued upon, may be equally applied to an argument which would go to negative the idea that the Commission intended either that the penalty of sec. 52, subdivision (f) of the Public Utilities Act should apply to the defendant railroad company in case of the violation of the terms of its order of August 13, 1912, on the one hand, or to declare void, as against parties not *in pari delicto*, contracts made in contravention to the terms thereof.

When we come to put into practice the test of determining what the scope and meaning of section 52 of the Public Utilities Act is we certainly are led to the irresistible conclusion that the legislative intent is expressed in terms sufficiently broad to confer upon the Railroad Commission the power to penalize, if not to render void, the contract of a public utility corporation to buy a typewriter ribbon, but, unless the contention of the learned counsel for the defendant is to prevail here, the penal character of this section is not, *ex necessitate*, carried into every special law enacted by the Railroad Commission in the form of one of its orders; but even if the penalty in the Public Utilities Act,

*ex proprio vigore*, follows the order of the Railroad Commission, nevertheless the penalty thereby provided is by its terms exclusive, and is directed to the corporations and its agents, and third parties dealing with the corporation are, therefore, not *in pari delicto*. Also the form of the penalty negatives the idea that it was the legislative intent to declare void contracts made in contravention of the Commission's orders. We do not have to speculate whether or not under the unlimited authority intended to be conferred on the Railroad Commission, it would have original power to declare in and by its orders that all contracts in contravention of the terms thereof, should be void. It is sufficient for all the purposes of this case that none of the analogies for declaring contracts void as against public policy where the parties are *in pari delicto*, obtain here. Neither the Public Utilities Act nor any order of the Railroad Commission declares that the contract between the plaintiff and defendant herein shall be void: from neither of these sources may any logical inference be drawn that it was the purpose of either the legislature or the Commission to destroy such a contract or prohibit its performance; but that, on the contrary, there is evidence of a most convincing nature that it was the purpose and intent of the Commission to leave the defendant corporation free to enter into this contract and many other kindred contracts.

It has been impossible for us to deal specifically with all the points raised in the brief filed by coun-

sel for the plaintiff in error. Our point of view is so widely different from theirs, that it has seemed necessary to present our theory of the law and the facts and depend upon the rule of exclusion to operate in our behalf. If your theory of the case is correct, theirs must be wrong; if ours is wrong theirs is right.

Counsel in the closing pages of their brief range far afield in search of expedient argument in behalf of sustaining their view of the wide scope to be given the powers of the Railroad Commission under the provisions of the Public Utilities Act. They refer to instances where they say the exercise of its summary jurisdiction has had a most beneficial influence. We are the last people in the world who would contend that the power of the Commission is limited. We admit it is plenary to a degree heretofore unknown to English law. We have no personal knowledge, and the record does not inform us concerning the action of the Commission in the case of the Solano Irrigated Farms Company or that of the San Francisco Oakland Terminal Railways. We will, however, call the Court's attention to the action of the Commission, as shown by the order of December 30, 1913 (Trans. pp. 83-89), in authorizing the construction of a portion of the main line of the Sacramento Valley Electric Railroad running north from a junction with the Oakland, Antioch and Eastern Railroad to the town of Dixon, a distance of  $12\frac{1}{2}$  miles at an esti-

mated cost of \$265,000. The several orders of the Railroad Commission show that the only source from which the money for the construction of this unit could have been drawn was from the proceeds derived from the sale of the preferred stock (see also Trans. pp. 89, 90). This stock was sold upon the express guaranty of the Commission that construction would not be entered into until there should be "in the hands of the company from the sale of stock \$750,000." It seems to us that counsel in perfect candor should also go outside the record and state to this Court that Yolo County farmers are defending suits upon notes, in an approximate amount of \$150,000, given the company on account of stock subscription made upon the faith of this guaranty: that this unit has been built and is being operated by the Oakland, Antioch and Eastern Railroad Company under an agreement between the company, its creditors among whom the operating company is one of the largest, with the knowledge of, *but without any formal approval* of a lease, *as required by law*, by the Railroad Commission.

We have great faith that upon the authorities that we have presented here, the Court will find no merit in a defense that seeks to violate common canons of good faith and honest dealing between men solely upon the theory that the Railroad Commission of California is so all-powerful that it can do no wrong.



We respectfully submit that the judgment of the trial Court should be affirmed.

Dated, San Francisco,  
March 15, 1916.

JACOB M. BLAKE,  
*Attorney for Defendant in Error*

No. 2670

IN THE  
**United States Circuit Court of Appeals**  
For the Ninth Circuit

SACRAMENTO VALLEY ELECTRIC RAILROAD  
COMPANY (a corporation),

*Plaintiff in Error,*

VS.

TAGGART ASTON,

*Defendant in Error.*

**SUPPLEMENTAL BRIEF FOR PLAINTIFF IN ERROR.**

A. C. HUSTON,  
BLACK & CLARK,  
*Attorneys for Plaintiff in Error.*

*Filed this*.....*day of March, 1916.*

FRANK D. MONCKTON, *Clerk.*

*By*.....*Deputy Clerk.*  
F. D. Monckton,  
*Clerk.*



No. 2670

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

SACRAMENTO VALLEY ELECTRIC RAILROAD  
COMPANY (a corporation),

*Plaintiff in Error,*

VS.

TAGGART ASTON,

*Defendant in Error.*

## SUPPLEMENTAL BRIEF FOR PLAINTIFF IN ERROR.

At the argument, the court granted permission to the plaintiff in error to supplement its brief by certain references.

We first refer to those portions of the record which we claim wholly contradict the idea that the railroad commission construed its order of August 13, 1912, as permitting the alleged contract in question. *We, of course, do not abandon our position that the statute by its negative provisions and by its use of the word "specified", is not to be construed as allowing implications.* The testimony referred to is as follows:

"Q. With reference to your going to the Railroad Commission for authority to make payments and to disburse money, did you do



that after the contract upon which the payments were made had been entered into and performed in any cases?

\* \* \* \* \*

A. In *some* instances, the Railroad Commission was consulted.

Mr. BLAKE. Q. How consulted?

A. An *informal consultation*; the matter was discussed with Commissioner Edgerton and his views ascertained; *I cannot recall now of our having made any contract previous to having obtained authority from the Commission.*

Q. Authority in that way?

A. *I don't recall any contract* that we entered into that was required to go to the Commission unless *we first had its consent.*

The COURT. Q. He is not talking about contracts, he is talking about expenditures, incidental expenses and things of that kind.

A. After the order of August 12th—in its terms it did not authorize, as we thought, the expenditures of our money for current expenses; the matter was taken up by some members of the board with Mr. Edgerton, and he told them to proceed and he would ratify it afterwards.

\* \* \* \* \*

Q. Then you did make expenditures without the formal authority of the Railroad Commission?

A. We paid our *office* expenses.

Q. Had you no preliminary surveys, or anything of that kind?

A. The preliminary surveys were made before the company was incorporated; subsequent to the incorporation of the company we had some additional surveys made, one, I believe, to Rio Vista, and one from Woodland to Dixon, *under the express authority of the Commission.*"

(Tr. pp. 76, 77 and 78.)

(Mr. Edgerton was one of the commissioners.)

Also the following:

“A. The first limitation of any particular consequence as far as these matters are concerned, appears on page 394:

‘Construction of the road shall not be entered upon nor liability created nor money paid out except for commissions as aforesaid until there shall be in the hands of the company from the sale of stock \$750,000; the proceeds from the sale of said preferred stock shall be used for the following purposes: For the purchase of materials and rolling stock and the construction of an electric railroad in certain territory all as set out in detail in the application and exhibits attached thereto.’

*My first impression* and construction of that order was that so far as *current* expenses were incurred, we had the implied right to it.

The COURT. I think your construction was correct.

A. (Continuing) And pursuant to that construction of this order, we filed, in accordance with the rules of the Commission, a monthly statement showing our disbursements. *Subsequently the question arose, and Mr. Edgerton suggested that the question could be eliminated by a formal order.* \* \* \* ”

An application was made and it was filed before any negotiations were had with plaintiff.

Tr. p. 66 (bottom of page).

The application made was acted upon on September 27, 1913, and the opinion and order of the railroad commission is set forth on pages 67 to 75 of the transcript.

And we ask the court's attention to the rule stated at page 67 of our brief, and to the Texas case, page 65 thereof, showing that even if the law was disregarded in one case it did not excuse its disregard in another.

The additional portions of the record relating to the order of August 13, 1912 (the order in force at the time in question), which we were granted leave to print, are the parts set forth in the opinion of the commission immediately preceding and virtually a part of its order. We quote, as follows:

*"Hence, we conclude that the commissions shall be paid in proportion as the purchase price is paid in, that is to say,—the salesman shall receive 20 per cent of each cash payment. The form of contract for the sale of stock should be submitted for the approval of the commission.*

*In order that reasonable assurance be had that the actual construction of this road will not be entered upon before there is sufficient money in hand to warrant proceeding with the scheme, there should be \$750,000 paid in on stock before any construction work begins or any expense other than that incident to the sale of stock is incurred by the company, and title to rights of way should be taken conditioned on the receipt by the company of the above amount of money.*

*In order that the commission may assure itself at all times that the money received from the sale of this stock is being properly and judicially expended for the purposes named, we recommend that in addition to a compliance with Order No. 24, applicant be ordered to submit to the commission for its approval before the execution thereof, all general contracts exceeding the amount \$1000.*

*Subject to the foregoing conditions we recommend that the application be granted."*

(Tr. pp. 62, 63.)

The pertinency of this testimony is apparent from the order, for in the order,—as is quite a usual thing now,—there was a prohibition against incurring liability until certain funds were raised. *The expense of selling stock* was in the order limited to **"commissions as aforesaid"**.

The order being absolutely clear, we again call the court's attention to the rule against reading exceptions into a statute unless the contrary construction leads to absurdity (Brief of Plff. in Error, pp. 58, 59 and 67). And we again earnestly insist that the word "specified", repeatedly used in the statute, was used deliberately and that both state courts and federal courts (Brief of Plff. in Error, p. 64) consistently sustain this and similar statutes and give full force and effect to the provisions thereof. And mere inconvenience has never yet been held the equivalent of absurdity.

We were also granted the privilege of locating more completely, for the convenience of the court, certain cases. The California case, *Moss v. Smith*, 51 Cal. Dec. 125, decided January 29, 1916, which we stated declares that the commission may now determine when and to what extent a public utility may incur debts in excess of its capital stock, or incur bonded indebtedness, is not yet reported in the Pacific Reporter, nor in the California Reports;



and from the local libraries we are unable to give the court any different references to the two Texas cases mentioned at pages 65 and 66 of our brief.

The telegrams mentioned at pages 34 and 35 of our brief are found at pages 54 and 55 of the record.

Dated, San Francisco,

March 25, 1916.

Respectfully submitted,

A. C. HUSTON,

BLACK & CLARK,

*Attorneys for Plaintiff in Error.*

No. 2670

IN THE  
**United States Circuit Court of Appeals**  
For the Ninth Circuit

SACRAMENTO VALLEY ELECTRIC RAILROAD  
COMPANY (a corporation),

*Plaintiff in Error,*

VS.

TAGGART ASTON,

*Defendant in Error.*

ANSWER OF DEFENDANT IN ERROR TO SUPPLE-  
MENTAL BRIEF FOR PLAINTIFF IN ERROR.

JACOB M. BLAKE,  
*Attorney for Defendant in Error.*

*Filed this.....day of April, 1916.*

APR 5 1916

**Filed**  
F. D. Monckton

FRANK D. MONCKTON, Clerk.

*By.....Deputy Clerk.*



No. 2670

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

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SACRAMENTO VALLEY ELECTRIC RAILROAD  
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## ANSWER OF DEFENDANT IN ERROR TO SUPPLEMENTAL BRIEF FOR PLAINTIFF IN ERROR.

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In reply to the point in the supplemental brief for plaintiff in error that the Railroad Commission did not construe the order of August 13, 1912, as permitting the contract of September 22, 1913, between the railroad company and Mr. Aston, we answer:

First, that under the terms of that order, in force and unmodified at the date of the contract, it is not susceptible of any other construction; and

Second, that no modifications of the order at later dates, to wit: on September 27th and December 30,



1913, by the Railroad Commission were inconsistent with such a construction; and

Third, that the conduct of the Railroad Commission has been uniformly consistent with the construction of the order of August 13, 1912, which sustains the validity of the contract with Mr. Aston.

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**THE ORDER OF AUGUST 13, 1912.**

This order made no provision in express terms for the expenditure of *any moneys* by the railroad company, other than the payment of commissions on the sale of its stock. The order recited that,

“Applicant be ordered to submit to the Commission for its approval before the execution thereof, all general contracts, exceeding the amount (of) \$1000.”

Lexicographers say the word “general” means “common to many or the majority; extensive though not universal.”

It is a relative term the meaning of which must be determined by the process of inclusion and exclusion.

Times Printing Company v. Star Pub. Co.,  
51 Wash. 667; 99 Pac. 1042.

Paraphrasing the rule laid down in *People v. Vickroy*, 266 Ill. 384, as to what constitutes a “general” law, we may say a contract is “general”, where a distinction is sought to be created as here, “not because it embraces all” contractual obliga-

tions, "but because it may embrace all" contracts "in a like situation." The necessity for a definition in the order itself of the term "general contracts" not only became imperative but it laid the ground for the conclusive implication, subsequently acted upon by both the railroad company and the Commission, that certain contracts were not within the limitation.

The Commission then proceeded to define the term, general contracts in the order itself under a provision,

"And in addition thereto said company shall submit to this commission for its approval the form of all contracts for the sale or exchange of stock *and before the execution thereof all contracts for grading, bridging, track, including materials and to labor, equipment of all kinds, and all materials, labor and property* involving costs in excess of \$1000.00."

Not only is the defendant in error protected by the rule of statutory construction that general terms of a statute or of an administrative order are controlled by special provisions touching the same subject, but we also have here a clearly expressed design on the part of the Commission to leave the railroad company free to fulfill all of its charter and franchise duties and responsibilities necessary to bring its railroad project forward to the beginning of the period of actual construction.

There was no limitation upon its power to contract for *services*. It cannot be contended that either the services of Mr. Aston in preparing a

report for Mr. Wilsey's use abroad, or the latter's services for the company in behalf of obtaining a proposal for a bond underwriting agreement would involve a contract for *grading, bridging, track, materials and labor, equipment or property*; and, it may be confidently said, it was never the purpose or intention of the Commission, that the railroad company should stand idle and refuse to perform its necessary and responsible duties under its franchise and charter in connection with initiating the sale of its bonds. The Court will take judicial notice of the fact that a 150 mile railroad system cannot be built and equipped with the proceeds of \$750,000 par value of preferred stock discounted to 80. No contention is made, nor is it necessary, that a contract, under the terms of the Public Utilities Act, authorizing the eventual sale and disposition of the bonds would not have to receive the approval of the Commission; but it seems plain, in the light of common knowledge and experience, that such *services* as Mr. Aston contracted to perform for the company in aid of efforts to be performed abroad in behalf of obtaining a proposal for such a contract, were essentially of the same kind and nature as those that the counsel for the company had to undertake when the company was first organized, and as those in a hundred and one other instances made necessary by the nature of the project itself while it was still in the process of formation.

**THE INTENTION OF THE COMMISSION TO LEAVE THE RAILROAD COMPANY FREE TO PERFORM ITS FRANCHISE DUTIES AND OBLIGATION NOT CHANGED BY ANY TERMS OF SUBSEQUENT ORDERS.**

The discussion of this point does not concede that the existence of such an intention would affect the obligation of the company to Mr. Aston as fixed by the terms of the order of August 13, 1912, but involves only the question of referring to the later orders in aid of a proper interpretation of the primary order.

Again we find that the \$1000.00 limitation applies wholly to contracts for grading, bridging, etc., etc.

We also find that at this time the company was by implication deprived by the Commission of the services of a regularly retained engineer; the recital in the order of September 27, 1913, being:

“The need of an engineer at this time where no construction is under way is not so apparent.”

The Commission evidently had in mind that the railroad company while engaged in the attempt to secure a proposal for an underwriting would out of the necessity of the case be compelled to pay the expenses of engineers detached in interest from the railroad company, and having the confidence of the underwriting syndicate. The Commission was wisely forestalling a *double expense* for engineering services at this point in the development of the project.



The order of December 30, 1913, varies somewhat the phrasing of the \$1000.00 limitation upon making contracts, but in no way modifies the intention of the Commission as expressed in the order of August 13, 1912. It is as follows:

“Provided, however, that before entering into any contract of \$1000.00 or more, for the *construction of said road or for the acquisition of materials or service therefor*, such contract shall be submitted to and obtain the approval of this Commission.”

When this order was made the railroad company was about to commence the construction of a 12-mile unit of its main line and had no money on hand except such as had been derived from the sale of its stock, and its only other securities were some \$150,000 worth of notes given on account of subscriptions to stock under the guaranty of the Commission that construction would not be commenced until \$750,000 of stock had been sold. The amount of cash was \$93,144. In this state of affairs can it be said with any degree of reasonableness, that even at this time there was an intention on the part of the Commission, when authorizing the construction of 12 miles only of main line, to disable the company from entering into those contracts for services which would have for their object to procure a bond underwriting in aid of the construction of the whole 150-mile system contemplated by the charter and franchise of the company.

That it had no such intention is conclusively evidenced, we think, by its consistent ratification even

after it had established a limitation upon the company's *general expense* account of first \$1000.00 and afterwards, \$1250.00 per month, of expenditures on other accounts (orders of September 27th and December 30, 1913).

The Railroad Commission acted upon the construction we contend for in ratifying promotion expenses, totaling \$3,159.00, one item of which amounted to \$1,287.15, in its order of December 30, 1913.

The foregoing expenses were incurred while the order of August 13, 1912, was in force, or prior thereto. There is a recital (Trans. p. 83) in regard to them as follows:

“Prior to and for a time after the incorporation of applicant, certain men were active in the promotion of the railroad project for which applicant was incorporated. During such activity they expended, on behalf of the project, various sums, totaling \$3,159.55, which they now ask this commission to pay in par of preferred stock.”

These expenses were approved by the Commission in addition to those amounting to \$40,468.42 approved by the order of September 27, 1913. This we respectfully submit, closes all that need be said in behalf of the construction that should be placed upon the terms of the order of August 13, 1915, to support the judgment in this case.

Counsel in the oral argument went considerably outside the record, so far as the single issue of law is concerned that is before the Court for decision,

to suggest that the recovery here is greatly disproportionate to any services rendered. It is true that the judgment is for the repudiation of an express contract, notice of which was given only some eight or ten days after the date of the contract. But it is also true that Mr. Wilsey went to London and in an interval between October 1, 1913, and sometime in January, 1914, Mr. Aston, with the knowledge and consent of the company, performed all the services originally contracted for, and his reports, two in number, were used by Mr. Wilsey in presenting the project to interested parties abroad: and Mr. Wilsey's efforts in this behalf were persisted in until the company absolutely refused to furnish him necessary expense money to allow a European representative of the syndicate to investigate the company's project on the ground. A judgment based upon the *quantum meruit* set up in the second cause of action would have raised the same issue of law as is here raised upon this appeal, and the findings and judgment rest on the undisputed facts sustained by the allegations based upon an express contract in the first cause of action in the complaint to which no exception was taken below.

In conclusion we may say that the defense of the plaintiff in error below and the contention on this appeal involves nothing more than an attempt to take advantage of its own inaction in not presenting the claim of Mr. Aston to the Railroad Commission for ratification. *Such ratification was not*

*necessary*, but if it had been it would seem that the company should not be allowed thus to take advantage of its own wrong. We have never desired to appear in the attitude of attacking the Railroad Commission; but on the other hand we have deemed it to be of the utmost importance that, under circumstances such as are presented by the record here, it should be understood that the public dealing with railroad companies are not put to hazards such as would attach in all cases of contracts between them and third parties, if the construction of the Constitution and laws of California in reference to public utility corporations as contended for here by the plaintiff in error should be upheld. We respectfully urge that it would be neither correct law nor proper ethics to sustain a defense that would allow the plaintiff in error to go to the Commission to get ratification of accounts it desired to pay and, under the same circumstances, seek to evade the payment of an equally just account it did not desire to pay, by deliberately refraining from asking a ratification by the Commission.

Dated, San Francisco,

April 3, 1916.

Respectfully submitted,

JACOB M. BLAKE,

*Attorney for Defendant in Error.*





No. 2670

IN THE  
**United States Circuit Court of Appeals**  
**For the Ninth Circuit**

SACRAMENTO VALLEY ELECTRIC RAILROAD  
COMPANY (a corporation),

*Plaintiff in Error,*

VS.

TAGGART ASTON,

*Defendant in Error.*

**PETITION FOR A REHEARING ON BEHALF OF  
PLAINTIFF IN ERROR.**

A. C. HUSTON,

Woodland, California,

BLACK & CLARK,

Mechanics Building, San Francisco,

*Attorneys for Plaintiff in Error  
and Petitioner.*

Filed this ..... day of October, 1916.

**Filed**

FRANK D. MONCKTON, Clerk.

OCT 27 1916

**F. D. Monckton,** ..... Deputy Clerk.  
Clerk.



No. 2670

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

SACRAMENTO VALLEY ELECTRIC RAILROAD  
COMPANY (a corporation),

*Plaintiff in Error,*

VS.

TAGGART ASTON,

*Defendant in Error.*

## PETITION FOR A REHEARING ON BEHALF OF PLAINTIFF IN ERROR.

*To the Honorable William B. Gilbert, Presiding  
Judge, and the Associate Judges of the United  
States Circuit Court of Appeals for the Ninth  
Circuit:*

A rehearing is requested in this case for a failure of the court to consider a vital fact. We shall make it entirely apparent that the court did not consider this fact, although it is disclosed by the record. The court in no way refers to this fact in its statement of the case. The fact is vital under the very principle which this court impliedly



upholds in the first part of its opinion. The fact requires a reversal of this case. That the relevancy of this fact may appear, it should be stated:

The plaintiff in error, Sacramento Valley Electric Railway Company, was sued by defendant Taggart Aston upon a contract for services as an engineer to determine the cost of construction and the probable traffic returns of a railroad which defendant had been organized to construct between Dixon, in Solano County, to Red Bluff, in Tehama County, California. It was alleged in one count of the complaint that the contract was made; that it was agreed \$3500 should be paid for the services; that the contract was performed in part and then repudiated; that \$150 had been paid plaintiff on account and plaintiff was entitled to \$3350 damages. In another count it was alleged that for services rendered by plaintiff as an engineer the defendant was liable to plaintiff in the sum of \$3500, the reasonable value of such services less the sum of \$150 paid on account. The findings of the court were in plaintiff's favor on the first count, and judgment went in his favor for \$2350, it being found by the court, however, that the condition under which one installment of the contract of \$1000 was payable was never fulfilled. It appeared the defendant company was considering the sale of its bonds which it desired to sell to raise money with which to construct its road and it was claimed the report to be prepared by Aston was to be used by one Wilsey in selling these bonds in Europe.

In addition to the defense that the contract was not made, defendant interposed the defenses:

1. The orders of the railroad commission of the State of California, authorizing the sale of the stock imposed conditions against the use of the proceeds of the sales of stock which conditions had not been fulfilled.

2. The Public Utilities Act of the State of California was equally prohibitive if there was no prohibition in the orders referred to.

This court has taken up and disposed of the first point made. It was possible, though we still think not reasonable, for the court to analyze the orders in question and declare they did not apply to contracts of the kind in question. But the court in going further and in approaching the second point, declared there was nothing in the statute which prohibited the contract in question. *But the court clearly overlooked the vital fact which had made admissible the orders in question, that is, the property and funds of the corporation defendant were proceeds of the sale of its stock.*

Not one line, not one word of the concluding paragraph of this court's opinion refers to this vital fact although we most earnestly insisted in our briefs that this fact was vital and pointed out and printed the testimony in support of it. We ask this rehearing in no formal spirit. We ask it because we believe we are in the right and because the court has omitted to note a fact that is abso-

lutely controlling. It attributed to Mr. Huston a statement he never made, but the correction of this error is not the purpose of this petition, although the error will be referred to later in this petition.

*The plaintiff's own testimony showed the facts which made the orders in question relevant.* It showed a contract made and payable when the company was as yet but selling stock. It showed the only source from which the alleged contract could be met when and as agreed was out of the proceeds of stock sales; that the company's only property was proceeds of stock sales. The court absolutely overlooks this fact. Yet because of this fact, and solely because of it, the orders in question were admissible. It was solely because of this fact that we sued out the writ of error and we most earnestly ask a consideration of it.

That we may have before the court with unqualified clearness the facts and the statute and the only words of the court's opinion leading to an adverse ruling because of failure to note this fact, we print here on one side the testimony and the law applicable and on the other side the statement of this court referred to.

TESTIMONY AND PROVISIONS  
OF STATUTE.

"A. C. Huston further testified on his cross examination:

'Mr. BLAKE. Q. At the time that this order was made, their (referring to the

STATEMENT OF COURT IN  
REGARD TO STATUTE.

There having been no apparent purpose in the commission to prevent the railroad company from making such a contract for services preliminary to construction

company, defendant) only source of income from any quarter was the sale of this stock?

A. That was the only source of income we (referring to the company, defendant) have ever had.'

A. C. Huston further testified on his redirect examination:

'Mr. CLARK. Q. Some reference was made to a sum of \$750,000 in the treasury before the company could proceed to do certain work or incur certain obligations; was that \$75,000 in the treasury from the source designated in the commission's order?

A. We never have had that amount at any time.' "

(Tr. p. 90.)

(b) \* \* \* No public utility shall without the consent of the commission, **apply** the issue of any stock or stock certificate, or bond, note or other evidence of indebtedness, or any part thereof, or any **proceeds** thereof, to any purpose **not specified in the commission's order** or to any purpose specified in the commission's order in excess of the amount authorized for such purpose, or issue or dispose of the same on any terms less favorable than

as is here sued upon, the plaintiff properly prevailed, unless the law itself forbade the contract. The statute, however, makes no declaration that a contract between a public utility and an engineer for work appropriately connected with preliminary matters is void without an order of the commission authorizing the same. With unmistakable certainty stock, stock certificates, bonds, notes or other evidences of debts issued without an order of the commission shall be void; but notwithstanding the far-reaching power of the commission as upheld in *Pacific Telephone etc. Co. v. Eshleman*, 166 Cal. 640, after careful examination of the several provisions of the act they fail to satisfy us that it was the intent of the law that the courts should refuse to enforce a contract which has not direct relation to stocks, bonds, and other evidences of debt, and which we cannot find is included in the meaning of the prohibitory terms of the statute. *Fackler v. Ford et al.*, 24 How. 322.

It being our conclusion that the contract with plaintiff for services was not be-



those specified in such order,  
or a modification thereof.

\* \* \* \* \*

(e) Every public utility which directly or indirectly, issues or causes to be issued any stock or stock certificate, or bond, note or other evidence of indebtedness, in non-conformity with the order of the commission authorizing the same, or contrary to the provisions of this act, or of the constitution of this state, or which **applies** the *proceeds from the sale thereof*, or any part thereof, to any purpose **other than** the purpose or purposes specified in the commission's order, as herein provided, \* \* \*

is subject to a penalty of not less than five hundred dollars nor more than twenty thousand dollars for each offense.

(f) Every officer, agent or employee of a public utility, and every other person \* \* \* who, directly or indirectly, knowingly applies or causes or assists to be applied the proceeds or any part thereof, from the sale of any stock or stock certificate, or bond, note or other evidence of indebtedness, to any purpose **not** specified in the commission's order, \* \* \* shall be guilty of a felony."

Cal. Stats., Ex. Sess. of  
1911, pp. 46, 47, 48.

yond the power of the corporation, the District Court was right in its judgment.

Affirmed.

Your Honors have held that the orders invoked and which provided that liability should not be incurred until certain moneys were on hand and which required that contracts calling for expenditure in excess of \$1000.00 should be submitted to the commission, related merely to construction work. The alleged contract called for the payment of a sum in excess of \$1000.00, it was never submitted to the commission in any way and the company never had on hand the \$750,000 named in the commission's orders, and, had the court held that the order related to contracts other than construction contracts, that would have made an end of this case. Your Honors held that the alleged contract did not relate to construction and reached the conclusion the orders did not prohibit the contract. Your Honors then failed to note that what the orders do not permit is prohibited by statute. That while the orders may prohibit certain acts and impose conditions when a stock issue is authorized, yet if no order is made or condition imposed as to the use of proceeds of the stock, it may not be used by the company. The provisions of the order to which the court's opinion is addressed, are as follows:

"Proper provision, however, may be made for the conditional acquiring of said rights of way in exchange for said common stock pending final consummation of such exchange. Construction of the road shall not be entered upon nor liability created, nor money paid out except for commissions as aforesaid until there shall be in the hands of the company from the sale of stock \$750,000."

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“And in addition thereto said company shall submit to this Commission for its approval the form of all contracts for the sale or exchange of stock and before the execution thereof all contracts for grading, bridging, track, including materials and labor, equipments of all kinds and all materials, labor and property involving costs in excess of \$1000.”

Tr. pp. 65, 66.

With all the earnestness with which we can speak, we wish to point out that there is nothing in the Public Utilities Act that concerns itself with the expenditure of property of a public utility that is not proceeds of sales of stock. We never for a moment contended and it has never been contended that the railroad commission of California may make orders dealing with the expenditure of property of a public utility that is not made up of proceeds of stock. It is a striking fact that your Honors have treated, and that Judge Van Fleet treated, as relevant, the orders of the railroad commission which you have discussed at length, when there is not conceivable any ground for urging the applicability of those orders unless we are dealing with a company whose project was conceded to be in a formative state and whose funds were proven to be, in the eye of the statute, trust funds subject to the dominion of the railroad commission. Aston's payments were to begin in a week and the only funds were what the company was getting for stock.

In the face of the fact to which we have now called to the court's attention, let us analyze the

last paragraph of this court's opinion. Your Honors say:

“There having been no apparent purpose in the commission to prevent the railroad company from making such a contract for services preliminary to construction as is here sued upon the plaintiff properly prevailed, unless the law itself forbade the contract. The statute, however, makes no declaration that a contract between a public utility and an engineer for work appropriately connected with preliminary matters is void without an order of the commission authorizing the same. With unmistakable certainty, stock, stock certificates, bonds, notes or other evidences of debts issued without an order of the commission shall be void; but notwithstanding the far-reaching power of the commission as upheld in *Pacific Telephone etc. Co. v. Eshleman*, 166 Cal. 640, after careful examination of the several provisions of the act they fail to satisfy us that it was the intent of the law that the courts should refuse to enforce a contract which has not direct relation to stocks, bonds, and other evidences of debt, and which we cannot find is included in the meaning of the prohibitory terms of the statute. *Fackler v. Ford et al.*, 24 How. 322.”

In other words your Honors leave out of your summary of subjects over which jurisdiction is conferred, the words “proceeds of the stock disposed of”, although the statute, in terms as clear as English language can express thought, has included the disposition and use of such proceeds within the jurisdiction of the railroad commission and conferred upon it exclusive authority in regard to the same. Where does this court get “with unmistak-



able certainty" the conclusion that the railroad commission must permit a stock issue and specify the purpose thereof? Where does this court get "with unmistakable certainty" the conclusion that the commission must permit a bond issue by a public utility? There is no foundation for any such conclusion in any part of the statute except in section 52, subdivisions (a) and (b) thereof, which provisions we have invoked. Yet your Honors have absolutely failed to note the concluding part of subdivision (b) of section 52, which we have quoted and shall again quote herein. With precisely the same "unmistakable clearness" with which the legislature of the State of California said that a share of stock or bond of a public utility should not be issued without the consent of the railroad commission, it said that the proceeds of stock were a trust fund which should be held to abide the orders of the railroad commission; that until, or if there was no order of the commission, the expenditure of those proceeds was illegal and a crime.

True the law says that in permitting sales of stock the commission may impose restrictions on the use of the proceeds, but the statute went further and in a later clause expressly declared that such proceeds must not be expended without the commission's consent. Your Honors did not decide this case.

"No public utility shall without the consent of the commission, **apply** the issue of any stock or stock certificate, or bond, note or other evidence of indebtedness, or any part thereof, or

any **proceeds** thereof, *to any purpose not specified in the commission's order*, or to any purpose specified in the commission's order in excess of the amount authorized for such purpose, or issue or dispose of the same on any terms less favorable than those specified in such order, or a modification thereof."

\* \* \* \* \*

Does this court find anything unmistakable about the words "No public utility"? Do not the words comprehend the defendant which was organized after the act was passed and which it was conceded was subject to the act? Is there anything unmistakable about the words "without the consent of the commission"? Do the words mean or do they not mean that a prohibition exists in the absence of any order? Could language be clearer than the words which follow:

"**apply** the issue of any **stock** \* \* \* or any **proceeds** thereof to any purpose **not** specified in the commission's order".

It was entirely a mistake to say that Mr. Huston declared that he was of the opinion that the statute did not prohibit this alleged contract. There is no such statement by Mr. Huston at any place in the record. Mr. Huston did point out that the commission's orders left it uncertain as to whether the company could pay its general expenses and that an informal consent to the payment of these expenses was obtained. But never for an instant did he concede that the statute, as regards the alleged Aston contract, was inoperative. On the contrary, he testified repeatedly that he told Aston the com-

pany would make no contract with him until the railroad commission had given its approval and the substance of this testimony is set out in the record:

“Defendant offered evidence in substance and effect that at the meeting of the board of directors on September 20, 1913, it was stated on their behalf that no contract would be made with the plaintiff, unless it was approved by the Railroad Commission and that the meeting adjourned without the giving of assent to any proposition and with the understanding that Mr. Wilsey was to come from Portland to San Francisco to meet the board and that any proposition for the sale of the company's bonds or for the employment of plaintiff was to be taken up at the next meeting of the board; that it was not stated that any committee or members of the board would act for the board in making a contract with plaintiff, but plaintiff denied that any such statements were made in his presence. The defendant further offered evidence to the effect that, at the time the document, Plaintiff's Exhibit 3, was signed, it was stated by Mr. Sisson and Mr. Manor that it expressed what they would be willing to agree to if the Railroad Commission approved such a contract, but this was denied by the plaintiff.”

Tr. pp. 28, 29.

How any remark of Mr. Huston's found in the record could be given the interpretation placed upon it by this court, we fail to understand. Nor, as shown by the Texas cases cited in our opening brief, could one violation of the statute justify another violation.

To allow the last paragraph of this court's opinion to stand would be a burial and not a decision in view of the omitted fact of the case to which we have referred. We have contended and do still contend that the judgment was most unjust. Whatsoever the ultimate ruling of the court may be, we most respectfully urge that we are entitled to a decision upon the facts and that it is absolutely clear that this court has not as yet decided the case upon the facts. It did proceed to declare its opinion regarding the Public Utilities Act. It did declare an interpretation of that act, but its declaration was utterly foreign to a specific and vital fact of this case. If this is not a case for a rehearing,—if when a court has decided a case without considering uncontradicted and controlling evidence a rehearing may not be had—then the privilege of applying for a rehearing is futile and so is the privilege of defending any case.

We plead with this court to note the fact that the statute prohibited the expenditure of this company's funds even if the order of the commission did not. Your Honors have looked through the commission's orders to see what they said about expenditures. You have said those orders did not prohibit the company's making the payments to Aston out of its funds and there you have stopped. You have concluded with a general statement regarding the statute, utterly failing to note the fact that the law which gave rise to the orders and compelled your decision as to the scope thereof,



declares that if there is no order of the commission, and the proposed expenditure is from proceeds of stock, the statute alone prohibits. You have first assumed that orders of the railroad commission of the State of California may have some force, and that the orders in this case were entitled to your consideration and then failed to note that the only fact which can give vitality or power to an order of the railroad commission relating to expenditures is the fact that the expenditure calls for the use of proceeds of sale of stock. Your Honors have overlooked the fact that if in the order permitting sales of stock prohibitions are not attached to the use of the proceeds of the sale, the statute says that until the commission grants its permission an expenditure can not be made.

If there is any one thing that the statute of the State of California made plain it was this,—that until the railroad commission of that state acted, proceeds of sales of stock could not be obligated by any contract the company might make. That is as plain as daylight. No court's judgment was made the substitute for the commission's judgment but the power and the duty was imposed upon the commission of determining for what purposes proceeds of sales of stock of the company might be used. If the court's decision could be said to be a decision that the railroad commission has not this power, we would have a decision determining "yes" to be "no".

"No public utility shall without the consent of the commission, **apply** the issue of any stock

or stock certificate, or bond, note or other evidence of indebtedness, or any part thereof, or any **proceeds** thereof, *to any purpose not specified in the commission's order*, or to any purpose specified in the commission's order in excess of the amount authorized for such purpose, or issue or dispose of the same on any terms less favorable than those specified in such order, or a modification thereof."

\* \* \* \* \*

If this be the law and it clearly is, what does it mean? Does it mean that the railroad commission has been given a discretion and yet its exercise may be subordinated to the judgment of a jury in Modoc County and to a different judgment of a different jury in San Diego County? Does it mean, that the parties, without exercising the precaution of having their contracts involving the proceeds of sale of stock of a public utility approved, can come into this or any other court and say the contract was such that it ought to be approved and therefore the money paid into a public utility on the faith that it would be expended upon orders of the railroad commission of the State shall be expended upon orders of the court. Is any such utterly absurd and meaningless interpretation to be given to a statute which has been treated elsewhere and which is regarded in this state as an important piece of constructive legislation and as meaning something. Does the act mean to "Tom," "Dick" and "Harry" who hand over their money to the stock salesman of a public utility that their money will

not be expended unless the railroad commission consents or does it mean nothing? Do the words:

“No public utility shall without the consent of the commission, **apply** the issue of any stock or stock certificate, or bond, note or other evidence of indebtedness, or any part thereof, or any **proceeds** thereof, *to any purpose not specified in the commission’s order*, or to any purpose specified in the commission’s order in excess of the amount authorized for such purpose, or issue or dispose of the same on any terms less favorable than those specified in such order, or a modification thereof.”

\* \* \* \* \*

mean something or do they mean nothing? Can this court or any court say that because it feels the particular expenditure was necessary or appropriate, therefore it should be made. Can this court or any court lawfully say that it is just as competent and expert as the railroad commission to pass upon every intricate question arising in the disbursement of the first funds of a public utility? Can it say this as a matter of law and prejudge the matter? It is obvious that neither this court nor any other court has any such power.

We desire again to point out the federal cases wherein the Circuit Court of Massachusetts and the Circuit Court of Appeals of the First Circuit declined to permit a court’s judgment to be substituted for that of a railroad commission, where, by contract and under a similar statute, it was

obvious that the proposed contract was within the jurisdiction of the railroad commission.

Augusta Trust Co. v. Federal Trust Co.,  
140 Fed. 930;

Augusta Trust Co. v. Federal Trust Co.,  
153 Fed. 157, 160.

And the Massachusetts Act is the act on which our statute was patterned. It has prohibitory language like our statute. It says:

“ \* \* \* the corporation shall not apply such proceeds otherwise than as specified in such order or orders.”

Buckley v. N. Y. N. H. & H. R. Co., 216 Mass.  
432; 103 N. E. 1033

It is now absolutely settled practice in the State of California for the railroad commission to exercise the jurisdiction in question.

“It is the duty of the Commission to see to it that stocks, bonds and other securities of such utilities are issued only for the purposes authorized by law *and the proceeds thereof are applied only to the purposes* and in the amounts specified in the Commission’s order” etc.

In re Tidewater Southern Ry. Co. Bond Issue, Vol. 1, Opinions and Orders of Railroad Commission of California, 624, 625.

We have shown to this court of what defendant’s property consisted. We have shown to this court that plaintiff’s own testimony proved of what it consisted. We showed the plaintiff knew, and it was not denied that plaintiff knew, of the statute



in question, and that he acted with knowledge of the statute and we earnestly insist that he should not be permitted to defy it, and that the court should grant the plaintiff in error a rehearing in this case.

Dated, San Francisco,

October 28, 1916.

Respectfully submitted,

A. C. HUSTON,

BLACK & CLARK,

*Attorneys for Plaintiff in Error  
and Petitioner.*

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CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for plaintiff in error and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition is not interposed for delay.

GEO. CLARK,

*Of Counsel for Plaintiff in Error  
and Petitioner.*

**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit.**

WESTINGHOUSE ELECTRIC & MANUFACTURING COMPANY, a Corporation,  
Plaintiff in Error,  
vs.

SAMSON IRON WORKS, a Corporation,  
Defendant in Error.

**Transcript of Record.**

Upon Writ of Error to the United States District Court  
of the Northern District of California,  
Second Division.

**Filed**

JAN 13 1916

**F. D. Monckton,**



No. 2674

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**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit.**

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WESTINGHOUSE ELECTRIC & MANUFACTURING COMPANY, a Corporation,  
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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*In the District Court of the United States for the  
Northern District of California, Second Division.*

No. 15,366.

WESTINGHOUSE ELECTRIC AND MANU-  
FACTURING COMPANY (a Corporation),  
Plaintiff,

vs.

SAMSON IRON WORKS (a Corporation),  
Defendant.

### **Amended Complaint.**

Now comes plaintiff, and by leave of Court first had and obtained files this its amended complaint herein, and for cause of action alleges :

#### **I.**

That at all the times herein mentioned the plaintiff, Westinghouse Electric and Manufacturing Company, was and now is a corporation organized and existing under and by virtue of the laws of the State of Pennsylvania, and is a citizen of the State of Pennsylvania.

#### **II.**

That at all the times herein mentioned the defendant, Samson Iron Works, was and now is a corporation organized and existing under and by virtue of the laws of the State of California, and is a citizen of the State of California.

#### **III.**

That on or about the 20th day of July, 1910, the said plaintiff and the said defendant made and en-

2 *Westinghouse Electric & Manufacturing Co.*

tered into a certain written agreement in the words and figures following, to wit: [1\*]

“WESTINGHOUSE ELECTRIC & MANUFACTURING COMPANY.

PROPOSAL.

Pittsburg, Pa., May 25, 1910.

Samson Iron Works,

(Hereinafter called the Purchaser),

Stockton, Cal.

Gentlemen:

Westinghouse Electric & Manufacturing Company (hereinafter called the Company), proposes to furnish the Purchaser, electrical apparatus and appliances as specified below: All apparatus included herein is to be delivered and erected on foundations in the basement of the Spaulding Building, Portland, Oregon.

1—75 K.W., compound wound, direct current, E.T. three-wire generator, 250–125 volts, 265 R.P.M complete with all three wire parts, and field rheostat.

The above generator is to be shipped immediately from San Francisco, Cal., and is to be furnished with a temporary switchboard, pending receipt of the complete switchboard, as specified below.

This generator with its gas engine will be considered as the first of three units which will be installed in the Spaulding Building. This first unit has to be in operation by July 1st, 1910, and it is agreed and understood that payment in the amount of \$1,500.00

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\*Page-number appearing at foot of page of original certified Record.

will be made on the total contract price, immediately upon installation and acceptance, which payment will not be made later than July 15, 1910.

1—75 K.W. compound wound, direct current, E.T., three wire generator, 250–125 volts, 275 R.P.M., complete with all three wire parts and field rheostat.

1—100 K.W. compound wound, direct current E.T., three wire generator, 250–125 volts, 250 R.P.M., complete with all three wire parts and field rheostat.

For the control of all of the above generators, there will be furnished One (1) four panel type 5-D switchboard, consisting of three (3) generator panels and one (1) load panel, all in accordance with specifications hereto attached. There will also be furnished and installed in conduits to be laid by the Spaulding Building in the Power House floor, all necessary cables in proper lengths and sizes for the complete connections from all generators to their respective switchboard panels, and also from the load panel to the main distribution panel. [2]

All necessary and proper connections will be made from each generator to its respective generator panel with proper regard for multiple operation of all of these units.

#### DELIVERY.

Delivery of the second 75 K.W. generator and the 100 K. W. generator will be made from our factory in approximately 90 days from date of receipt of order, with full and complete information.



#### 4 *Westinghouse Electric & Manufacturing Co.*

##### TERMS.

Full payment for the second and third units as mentioned above, will be made immediately upon erection and acceptance, it being further agreed and understood that this payment shall not exceed 45 days from date of Bill of Lading, showing shipment from our factory, East Pittsburg.

If partial payments are made of the second and third units, it is understood that payments will be made on the same basis as above in pro rata amounts of the total contract figure.

##### PERFORMANCE SPECIFICATIONS.

The operation of all of the above generators will be in accordance with specifications hereto attached.

##### PRICE.

The price of all of the above apparatus including freight, cartage, erection of generators on foundations supplied by the Spaulding Building, installation and all connections to switchboard, necessary cables for same and delivery of the armatures of the second 75 K.W. and the 100 K.W. to the Samson Iron Works, Stockton, Cal., but not including pressing of the armatures on to the engines shafts, will be Seven Thousand Eight Hundred and fifty 00/100 Dollars (\$7,850.00).

Copyright 1909 by

WESTINGHOUSE ELECTRIC & MANUFACTURING COMPANY.

Pittsburg, Pa.

SWITCHBOARD INQUIRY AND DATA SHEET.

May 25, 1910.

Switchboard for SAMSON IRON WORKS—  
Spaulding Building, Portland, Oregon.

1. Name by which plant is known, Spaulding Building. [3]
2. Kind of service, Light and Power (Elevators).
3. Is there any other switchboard in this plant?  
No.
4. Finish of Board. Std. Black Marine Slate.
5. Sequence of panels and general date (see also Panel Specification, Form P-1609):

Panel No.	Description of Apparatus or Circuit to be Controlled.	Do Leads Come to Panels From Above or Below?
1.	75 K.W. three wire generator.	
2.	“ “ “	
3.	100 K.W. three wire generator.	Below
4.	Load panel for above.	
6.	Operation of generators. In parallel.	
7.	Are generators separately excited?	
8.	Do exciters operate in parallel with others?	
9.	Must rheostats be proportioned to operate with an automatic voltage (Tirrill) Regulator? Yes.	
10.	Does purchaser insist that large rheostats and meter transformers be supported on rear of panels? No.	

6 *Westinghouse Electric & Manufacturing Co.*

11. If feeder regulators are used, can they be operated in the same manner as sprocket operated rheostats? If not, indicate relative arrangement of regulators and panels.
12. Finish of meters and trimmings. Standard.
13. Will purchaser require light load accuracy of integrating wattmeters, thus requiring separate series transformers, or can wattmeters be operated on series transformers with other meters?
14. Can any apparatus be operated from meter transformers now installed in plant?
15. Will Westinghouse Automatic Synchronizer be required?
16. Are we to adhere strictly to specifications? If not, how much may we deviate, and may we put in alternate propositions?
17. Basis of proposition.

DATA TO BE FILLED IN WHEN ORDER IS  
CLOSED.

18. Board is to be erected 48 inches from the wall.
19. Has full information noted under question 3 been sent? Yes. [4]
20. Complete data regarding all rheostats and starting devices to be provided for—Has this been sent?
21. Send drilling plans, data and all necessary dimensions on foreign apparatus—Has this been done?
22. If apparatus is remote control, sufficient drawings, sketches and information must be sent

to show location of apparatus and include enough data of floors and building details to make designs. Has this been sent?

23. Will purchaser require any drawings for approval or erection? Yes—for erection.

Shall the Company await approval of drawings before starting manufacture? No.

24. If D. C. Generators are to be provided for, are series coils connected on the positive or negative side? Standard.

25. Does any panel ordered require special arrangement of apparatus? No.

26. Are meters to be shipped with panels or are they to be held at factory until needed? With panels.

## WESTINGHOUSE ELECTRIC &amp; MANUFACTURING COMPANY.

Pittsburg, Pa.

## PERFORMANCE OF SPECIFICATION.

## DIRECT CURRENT ENGINE TYPE GENERATOR.

## THREE WIRE.

FOR SAMSON IRON WORKS—Spaulding Building—Date May 25, 1910.

## NORMAL (FULL LOAD) RATING:

Item.	Specification Number.	Kw.	Volts.	Amperes.	Winding.	Poles.
(a)	5830	75	250 125	300	compound	6
					R. P. M.	Frame
					265	Vert. Split
(b)	5829	75	"	"	Winding	Poles
					compound	Vert. Split
					R. P. M.	Frame
					275	Vert. Split
(c)	5840	100	"	400	Winding	Poles
					compound	Vert. Split
					R. P. M.	Frame
					250	Vert. Split

## CONSTRUCTION.

GENERAL DESCRIPTION:—The armature and commutator will be built together upon a ventilated sleeve or spider, and arranged [5] to be pressed on the shaft. The field frame will be provided with screws and liners for adjusting its position. Foundation bolts are not included. Shaft keys are not included where the armature is to be pressed on engine shaft.

FIELD:—The field frame of these generators will



be made of a high grade of iron or steel, sound and free from blow-holes. The poles will be made of laminated steel and so proportioned as to reduce the armature reaction. They will be bolted to the field frame and can be readily removed. For compound wound generators, the series and shunt field coils will be so proportioned as to automatically give the voltage indicated under 'Regulation.' For shunt wound generators, the field coils will be so wound that voltage regulation can be obtained by means of a field rheostat. The coils will be insulated in a suitable manner with material which can be subjected to a temperature of 90 degrees Centigrade without injury.

**ARMATURE:**—The armature will be of the drum type with open slots for the winding. The coils will be interchangeable and will form a winding such that its circuits will not become unbalanced with the armature displaced as much as  $1/32$  inch from its geometrical centre. Before being placed in the slots the coils will be completely insulated in a substantial manner with material which can be subjected to a temperature of 90 degrees Centigrade without injury. The coils will be held in the slots by hard fibre wedges. The core will be built up of high grade laminated sheet steel of good magnetic quality.

**COMMUTATOR:**—The commutator will be built on an extension of the armature spider. It will be made of copper bars hard drawn to gauge and securely clamped in position. The bars will be thoroughly insulated by mica. The leads from the armature coils will be soldered to the necks of the commutator and each joint will have as great carrying ca-

capacity as the armature conductor.

**BRUSHES:**—The arms carrying the brushes will be strong and rigid and will be supported by a ring which may be shifted for adjusting the brushes. The brush holders will be of the sliding shunt type. Carbon brushes will be used, and they will be of such size and number as to carry all loads specified.

**VENTILATION:**—The armature spider, core and windings will be provided with ventilating spaces and the design will be such that the rotation of the armature will set up a forced circulation of air through them. Spaces will be left between the field coils, so that a free circulation of air will be obtained while the machine is in operation, and the ends of the armature coils will be so formed that the air will circulate freely through them.

## PERFORMANCE:

**COMMUTATION:**—The brushes having been once adjusted, there will be practically no sparking or burning of the brushes or blackening of the commutator within the limits of the time loads specified, nor will there be injurious sparking at the momentary overloads.

Item.	Commutation Without Shifting Brushes.		Regulation—Compound Wound Generators Only	
	No Load to.	Momentarily.	No Load Voltage.	Full Load Voltage.
(a)	50% Overload	75% Overload	230	250
(b)	50% Overload	75% Overload	230	250
(c)	50% Overload	75% Overload	230	250

**REGULATION:**—The regulation is based on a variation of speed in the prime mover of not more than 2 per cent from no load to full load. A less amount of compounding can be obtained by adjust-

ing a shunt to the series winding. The generators covered by these specifications, however, should not be operated with a full load voltage less than 94 per cent of [6] normal full load voltage, or a no load voltage higher than 92 per cent of normal full load voltage.

Efficiency Per Cent. Approx.				
Item.	$\frac{1}{2}$ Load.	$\frac{3}{4}$ Load.	Full Load.	$1\frac{1}{4}$ Load.
(a)	90.5	91.5	91.5	90.25
(b)	90.5	91.5	91.5	90.25
(c)	91	91.5	91.2	90
Temperature Rise Deg. C.				
Commutator.				
Full Load	Followed by	May Rise Above	Momentary Overload	
24 Hours.	$1\frac{1}{4}$ Load for 2 Hours.	Other Parts.	Without Injury.	
35	50	0	75%	
35	50	0	75%	
35	50	0	75%	

EFFICIENCY.—The efficiencies are to be calculated from the 12R losses in the armature winding and filed coils, brushes and rheostats, core loss and brush friction, these losses being measured separately and based on normal load, speed and voltage.

TEMPERATURE.—Temperatures are to be measured by thermometer, and for room temperatures other than 25 degrees Centigrade corrections according to the Standardization Rules of the American Institute of Electrical Engineers will apply.

METHOD OF TEST:—All tests will be conducted in accordance with the Standardization Rules of the American Institute of Electrical Engineers, and, when feasible, will take place at the Works of Westinghouse Electric & Manufacturing Company. On all points not covered by the Rules of the A. I. E. E., the standard test rules of Westinghouse Electric & Manufacturing Company will be followed. Where

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the temperature guarantee is for a period of 24 hours, it is understood that in making tests the run will be only for such length of time as is required to reach a constant temperature. When completed, the generators will be subjected to insulation tests in accordance with the Rules of the A. I. E. E. [7]

### WESTINGHOUSE ELECTRIC & MANUFACTURING COMPANY.

Pittsburg, Pa.

#### PANEL SPECIFICATION.

There will be supplied Two Panels; Type 5-D, Style No. 23033, marked on Data Sheet as Panel Nos. one and two, to be used for the control of 2—75 K.W.D.C. engine type three wire generators.

Each Panel will be made up of three sections, the dimensions of which will be as follows:

Upper Section . . . . ft., 20 in. high, 32 in wide and 2 in. thick.

Middle Section . . . . ft., 45 in. high, 32 in wide and 2 in. thick.

Lower Section . . . . ft., 25 in. high, 32 in. wide and 2 in. thick.

All front edges to have  $\frac{1}{2}$  inch bevels.

Upon each of these Panels will be mounted the following apparatus:

Item.	Description.	Style No. or Catalogue No.
1	400 amp. type 'C' two pole automatic circuit-breaker with equalizer contacts.	
2	500 amp. type 'D' ammeters.	
1	Pilot lamp bracket and shade.	
1	Ground detector outfit.	
1	type 'Q' rheostat handle and mounting.	
1	Voltmeter plug receptacle.	
2	300 amp. two pole single throw knife switches.	
2	75 amp. two pole single throw knife switches for balancing coils.	

NOTE.—Ground detector outfit will be furnished on first panel only.

WESTINGHOUSE ELECTRIC & MANUFACTURING COMPANY.

Pittsburg, Pa.

PANEL SPECIFICATION.

There will be supplied One Panel; Type 5-D, Style No. 23034 marked on Data Sheet as Panel No. three, to be used for the control of 1-100 K.W. D.C. engine type three wire generator.

Each Panel will be made up of three sections, the dimensions of which will be as follows:

Upper Section . . . . ft., 20 in. high, 32 in. wide and 2 in. thick.

Middle Section . . . . ft., 45 in. high, 32 in. wide and 2 in. thick.



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Lower Section . . . ft., 25 in. high, 32 in. wide and 2 in. thick.

Upon each of these Panels will be mounted the following apparatus:

Item.	Description.	Style No. or Catalogue No.
1	400 ampere type 'C' two pole automatic circuit breaker with equalizer contacts.	
2	600 ampere type 'D' ammeters	[8]
1	Pilot lamp, bracket and shade.	
1	Type 'Q' rheostat hand-wheel and mounting.	
1.	Voltmeter plug receptacle.	
2	400 amp. two pole single throw knife switch.	
2	100 amp. two pole single throw knife switches for balancing coils.	

### WESTINGHOUSE ELECTRIC & MANUFACTURING COMPANY.

Pittsburg, Pa.

#### PANEL SPECIFICATION.

There will be supplied One Panel; Type 5-D, Style No. 45099 marked on Data Sheet as Panel No. four, to be used as a load panel.

Each Panel will be made up of three sections, the dimensions of which will be as follows:

Upper Section . . . ft. 20 in high, 24 in wide and 2 in. thick.

Middle Section . . . ft. 45 in. high, 24 in wide and 2 in. thick.

Lower Section . . . . ft. 25 in. high 24 in. wide and 2 in. thick.

All front edges to have  $\frac{1}{2}$  inch bevels.

Upon each of these Panels will be mounted the following apparatus:

Item.	Description.	Style No. or Catalogue No.
2	2000 ampere illuminated dial type 'E' ammeters	
1	1200 ampere three wire integrating wattmeter.	

# WESTINGHOUSE ELECTRIC & MANUFACTURING COMPANY.

Pittsburg, Pa.

## PANEL SPECIFICATION.

There will be supplied . . . . . Panel . . . . . Type, Style No. . . . . marked on Data Sheet as Panel No. . . . ., to be used for the control of . . . . .

Each Panel will be made up of . . . . . sections, the dimensions of which will be as follows:

Upper Section . . . . ft., . . . . in. high, . . . . in. wide and . . . . in. thick.

Middle Section . . . . ft., . . . . in. high, . . . . in wide and . . . . in. thick.

Lower Section . . . . ft., . . . . in. high, . . . . in. wide and . . . . in. thick.

All front edges to have . . . . . inch bevels.

Upon each of these Panels will be mounted the following apparatus:

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Item.	Description.	Style No. or Catalogue No.
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As extras will be furnished—

Mounted on bracket arms at one end of the board will be—2—300 volt type 'E' illuminated dial volt-meters.

Mounted on bracket arms at the other end of the board will be—  
2—Type TD 125 automatic voltage regulators.

There will also be furnished all necessary buss bars and wiring on the back of the boards. [9]

1. All apparatus shall be installed by and at the expense of the Purchaser, unless otherwise expressly stipulated.

2. The Company guarantees that the apparatus herein specified will generate or utilize electrical energy to their rated capacities without undue heating and will do their work in a successful manner, provided they are kept in proper condition and operated under normal conditions, and the Purchaser supplies competent supervision for their operation. The Company agrees to correct, at its own expense, any defects of labor or material in said apparatus which may develop under normal and proper use within thirty days after the starting thereof, provided the Purchaser gives the Company immediate written notice of such defects, and the correction of such defects by the Company shall constitute a fulfillment of its obligations to the Purchaser hereunder.

3. In case it is elsewhere herein agreed that the Company shall erect the apparatus herein specified, it is with the distinct understanding that the Company is to furnish the said apparatus and the labor of the erection only, the Purchaser furnishing all foundations and masonry work, including grouting, supports, builders' or joiners' work, access to premises, excavation and making good again. It is also understood that the material and workmanship of such foundations, supports, etc., shall be first-class and adequate for the purpose intended.

4. The property in and title to the apparatus and the right to use the same under the patents of the Company shall not pass from the Company until all payments hereunder (including deferred payments and payments of notes and renewals thereof, if any) shall have been fully made in cash, and the apparatus herein specified shall remain the personal property of the Company, whatever may be the mode of its attachment to the realty or other property, until fully paid for in cash, and the Purchaser agrees to perform all acts which may be necessary to perfect and assure retention of title to the said apparatus to the Company. If default is made in any of the payments in the manner and form and at the time herein specified the Company shall be entitled to the immediate possession of said apparatus and shall be free to enter the premises where such apparatus may be located and remove the same as its property, without prejudice to any further damages which the Company may suffer by reason of the Purchaser's failure

to surrender the apparatus when so required. (A resale of the apparatus herein specified or any part thereof or installation of the same, by the Purchaser, as agent or contractor for another shall not alter the effect and intent of the foregoing provisions, it being understool that the Company's rights may be enforced against the Purchaser's vendee or principal the same as they might have been enforced against the Purchaser if such resale or installation had not been made.)

5. In order to insure the Purchaser against any possible loss or expense by reason of adverse claims under patents based upon the use of any electrical apparatus covered by this proposal, the Company guarantees that the Purchaser shall not be disturbed in the use of the said electrical apparatus by litigation based upon such adverse claims, and to that end the Company will, at its own expense, defend any and all suits or proceedings that may be instituted against the Purchaser for the infringement, or alleged infringement, of any patent or patents by the use of any of the said apparatus, provided such [10] infringement shall consist in the use of said apparatus or parts thereof in the regular course of the Purchaser's business and provided the Purchaser be not in default in payments thereof, and gives to the Company immediate notice in writing of the institution of the suit or proceedings, and permits the Company through its counsel to defend the same, and gives all needed information, and assistance and authority to enable the Company so to do; and thereupon in case



of an award for damages the Company will pay such award, and in case of an injunction against the Purchaser the Company will pay to the Purchaser any loss or damages to the Purchaser's business caused by such injunction.

6. In consideration of the foregoing guarantee, the Purchaser covenants not to violate or infringe any of the United States Letters Patent relating to any of the apparatus herein specified which are controlled by the Company or under which the Company has the right to manufacture or sell any of such apparatus and not to contest the Company's title thereto or rights thereunder or the validity or scope thereof and also agrees that if any trolleys or controllers or parts of trolleys and controllers are covered or are to be covered by this proposal the purchaser will not use or permit others to use such trolleys or controllers, or parts of trolleys or parts of controllers, except when incorporated in and used as parts of such car equipments as the Purchaser had prior to July 1, 1896, or of such additional car equipments as the Purchaser has since purchased or may hereafter purchase from the Company or from a manufacturer duly licensed under the aforementioned patents (the license of the Purchaser to use such trolleys and controllers and parts thereof being expressly qualified as in this paragraph provided.)

7. The Company shall not be held responsible or liable for any loss, damage, detention or delay caused by fire, strike, civil or military authority, or by insurrection or riot, or by any cause beyond its control,

and the receipt of the apparatus by the Purchaser shall constitute acceptance for delivery and a waiver of any and all claims for loss or damage due to delay, but this shall not relieve the Company from the obligations specified in paragraph 2 of this page.

8. The Company will recommend engineers for service in installing and operating the apparatus herein specified if desired by the Purchaser, whose compensation shall not be less than \$7.00 per day, each, and boarding and traveling expenses, all of which shall be paid by the Purchaser; it being understood and agreed that during the term of such service the said engineers shall be the Purchaser's employees, for whose acts the Company shall assume no responsibility.

9. The Purchaser shall provide and maintain, in the name of Westinghouse Electric & Manufacturing Company, sufficient insurance on the apparatus herein specified, against loss or damage by fire during the period between delivery and final payment, to cover the unpaid balance of the purchase price, and, failing so to do, no loss or damage by fire during the aforesaid period shall serve to relieve the Purchaser of the obligations imposed by this agreement.

10. In case the Company, under this proposal, furnishes oil, wire, cable or other material requiring special carriers (such as oil barrels, reels, etc.) then the Purchaser will pay to the Company, under the terms of this agreement, the value [11] of such carriers in addition to the contract price. Upon return to the proper receiving point designated by the Company of such carriers in first-class condition, the Company will credit the Purchaser the full amount

previously charged; provided, however, that invoice or memorandum and necessary shipping documents are promptly forwarded to the Company and return shipment is made within four months from the original date of shipment, charges prepaid.

PRICE: As hereinbefore specified.

TERMS as follows: All payments shall be made in New York or Pittsburgh funds and with reference to the bill of lading in accordance with the following terms; and, in case partial payments are made at different times, pro-rata payments shall be made therefor. If shipment of the apparatus herein specified, or any material part thereof, is delayed from any cause for which the Purchaser is directly or indirectly accountable, the date of completion of the apparatus by the Company shall be regarded as the date of shipment, in determining when payments for said apparatus are to be made, and the Company shall be entitled to receive reasonable compensation for storing the completed apparatus, which shall be held at the Purchaser's risk.

Fifty (50) per cent Sight Draft attached to Bill of Lading.

Forty (40) per cent Thirty (30) days from date of Bill of Lading.

Ten (10) per cent Sixty (60) days from date of Bill of Lading.

As hereinbefore specified.

SHIPMENT:—The apparatus specified above will be shipped as follows:

As herein before specified.

AGREEMENT:—All previous communications between the parties hereto, either verbal or written,

with reference to the subject matter of this proposal, are hereby abrogated, and this proposal duly accepted and approved constitutes the agreement between the parties hereto, and no modification of this agreement shall be binding upon the parties hereto, or either of them, unless such modification shall be in writing, duly accepted by the Purchaser and approved by an executive officer of the Company.

The foregoing proposal must be accepted by the Purchaser within twenty (20) days from its date and must be approved by an executive officer of the Company in order to make it binding upon the Company.

Respectfully yours,

WESTINGHOUSE ELECTRIC & MANUFACTURING COMPANY.

By CARL L. WERNICKE,

Approved: Pittsburg, Pa., July 18, 1910.

WESTINGHOUSE ELECTRIC & MANUFACTURING COMPANY.

By H. D. SHUTE,

Acting Vice-president.

Witness: J. C. DOLAN." [12]

"ACCEPTANCE.

The foregoing proposal is hereby accepted at the prices and upon the terms and conditions named therein.

SAMSON IRON WORKS.

By S. H. HEAD,

Sales Manager.

Witness: CARL L. WERNICKE."



## IV.

That in pursuance of the terms and conditions of said agreement and in conformance therewith, plaintiff was by the 1st day of July, 1910, ready, able and willing to furnish, deliver and erect on foundations in the basement of the Spaulding Building, Portland, Oregon, and to have in operation, such 1-75 K. W., compound wound, direct current, E. T. three-wire generator, 250-125 volts, 265 R. P. M., complete with all three-wire parts, and field rheostat, furnished with such temporary switchboard. That by reason of the facts that said Spaulding Building was not in readiness for such installation, and that defendant failed to furnish proper appliances for such operation, plaintiff was prevented from furnishing, delivering and erecting the said electrical apparatus and appliances, and from having the same in operation on or before said 1st day of July, 1910. That as soon as said Spaulding Building was in readiness for such installation and as soon as defendant furnished proper appliances for such operation, plaintiff furnished, delivered and erected said generator, together with a temporary switchboard and necessary cable, on foundations in said basement of said building, and had the same in operation.

## V.

That within approximately ninety (90) days from date of receipt of order, plaintiff was ready, able and willing to deliver from plaintiff's said factory, with full and complete [13] information, such 1-75 K. W. compound wound, direct current, E. T., three-wire generator, 250-125 volts, 275 R. P. M., complete with



all three-wire parts and field rheostat, and such 1-100 K. W. compound wound, direct current, E. T., three-wire generator, 250-125 colts, 250 R. P. M., complete with all three-wire parts and field rheostat, together with such four-panel type 5-D switchboard, consisting of three generator panels and one load panel, for the control of all said generators, and also was ready, able and willing to furnish and install in such conduits all such necessary cables in such proper lengths and sizes for such complete connections from all said generators to their respective switchboard panels, and also from the load panel to the main distribution panel, and to make all such necessary and proper connections from each generator to its respective generator panel with proper regard for multiple operation of all said units.

That defendant failed, neglected and refused to pay said sum of fifteen hundred dollars (\$1500.00) immediately upon installation and acceptance of said first unit or on or at any time prior to or since the 15th day of July, 1910, and still so fails, neglects and refuses.

That on or about the 25th day of August, 1910, and before the time specified in the said contract for the delivery of said last-mentioned generators, apparatus and appliances, defendant notified plaintiff that defendant would not accept plaintiff's generators or any other part of plaintiff's machinery, and that said contract herein set forth was void and of no effect. That by reason of said acts of defendant and of defendant's failure to perform the terms and conditions of said agreement, plaintiff has been damaged

in the sum of [14] thirty-one hundred dollars (\$3100.00).

And for a second and further cause of action against said defendant, plaintiff by leave of Court first had and obtained, alleges:

I.

Refers to paragraphs I and II of the first count and cause of action in this amended complaint contained, and asks that they and the allegations therein contained be considered a part of this count and cause of action as if they were expressly set forth herein.

II.

That defendant is indebted to plaintiff for goods sold and delivered and labor and materials furnished by plaintiff to defendant, at the request of defendant, within two years next preceding the commencement of this action, of the reasonable value of thirty-one hundred dollars (\$3100.00), That neither said sum nor any part thereof has been paid, and the same is now wholly unpaid.

WHEREFORE, plaintiff prays judgment against defendant for the sum of thirty-one hundred dollars (\$3100.00), together with interest, and costs of suit.

J. C. CAMPBELL,

DAVID L. LEVY,

Attorneys for Plaintiff. [15]

State of California,

City and County of San Francisco,—ss.

W. W. Briggs, being first duly sworn, deposes and says: That the plaintiff, the Westinghouse Electric and Manufacturing Company, is a corporation and that said affiant is an officer of said corporation, to

wit, the managing agent thereof, and that he makes this affidavit for and on behalf of said plaintiff corporation. That he has read the foregoing amended complaint in the within-entitled action and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated upon information or belief, and that as to those matters he believes it to be true.

W. W. BRIGGS.

Subscribed and sworn to before me this 18th day of December, 1912.

[Seal]

FLORA HALL,  
Notary Public, in and for the City and County of  
San Francisco, State of California.

[Endorsed]: Filed Dec. 19, 1912. W. B. Maling.  
Clerk. By J. A. Schaertzer, Deputy Clerk. [16]

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*In the District Court of the United States in and for  
the Northern District of California, Second  
Division.*

No. 15,366.

WESTINGHOUSE ELECTRIC AND MANU-  
FACTURING COMPANY, a Corporation,  
Plaintiff,

vs.

SAMSON IRON WORKS, a Corporation,  
Defendant.

**Answer to Amended Complaint and Counterclaim.**

The defendant above named, answers to the Amended Complaint on file in the above-entitled cause, as follows:

## I.

Said defendant denies that on or about the 20th day of July, 1910, the defendant made and entered into that certain written agreement set forth in said amended complaint, or into any written agreement whatsoever, or at all, but admits that on the 26th day of May, 1910, it entered into a written agreement with said plaintiff a copy of which is hereto attached, marked Exhibit "A," and hereby referred to and made a part hereof.

## II.

Answering unto the fourth article in said amended complaint, this defendant denies that in pursuance of the terms and conditions of said agreement, or in conformance therewith, or otherwise, or at all, the plaintiff was by the 1st day of July, 1910, ready, able, or willing to furnish, or deliver, or erect on foundations in the basement of the Spaulding Building, Portland, Oregon, or to have in operation, such 1-75 K. W., compound wound, direct current, [17] E. T., three-wire generator, 250-125 volts, 265 R. P. M., complete with all three-wire parts, and field rheostat, furnished with such temporary switch-board, or that the said plaintiff was otherwise, or at all, ready, or able, or willing to furnish, or deliver or erect said generator.

Further answering unto said fourth article, said defendant denies that said Spaulding Building was not in readiness for such installation, or that the defendant failed to furnish proper appliances for such operation; and further denies that by reason of the fact that said Spaulding Building was not in readi-



ness for such installation and that defendant failed to furnish proper appliances for such operation, plaintiff was prevented from furnishing, or delivering, or erecting the said electrical apparatus or appliances, or was prevented from having the same in operation on or before said 1st day of July, 1910; defendant further denies that by reason of any matter or thing whatsoever, done, or failed to have been done by said defendant, said plaintiff was prevented from furnishing, or delivering, or erecting the said electrical apparatus or appliances, or from having the same in operation on or before the 1st day of July, 1910. Defendant further denies that as soon as said Spaulding Building was in readiness for such installation, or as soon as defendant furnished proper appliances for such operation, plaintiff furnished, or delivered, or erected said generator, together with a temporary switchboard or necessary cable, on foundations in said basement in said building, or had the same in operation.

### III.

Answering unto the fifth article in said amended complaint, and particularly unto the allegations therein that within approximately ninety days from receipt of order, plaintiff was ready, able [18] and willing to deliver from plaintiff's said factory, with full and complete information, such 1-75 K. W. compound wound, direct current, E. T., three-wire generator, 250-125 volts, 275 R. P. M., complete with all three-wire parts and field rheostat, and such 1-100 K. W. compound wound, direct current, E. T., three-wire generator, 250-125 volts, 250 R. P. M., complete



with all three-wire parts and field rheostat, together with such four-panel 5-D switchboard, consisting of three generator panels and one load panel, for the control of all said generators, and also was ready, able and willing to furnish and install in such conduits all such necessary cables in such proper lengths and sizes for such complete connections from all said generators to their respective switchboard panels, and also from the load panel to the main distribution panel, and to make all such necessary and proper connections from each generator to its respective generator panel with proper regard for multiple operation of all said units, this defendant has no information or belief upon the subject sufficient to enable it to answer the same, wherefore, on that ground it denies, generally and specifically, each and all of the allegations therein contained.

Further answering unto said article, and particularly unto the allegation therein that defendant failed, neglected and refused to pay said sum of fifteen Hundred Dollars (\$1500) immediately upon installation and acceptance of said first unit, or on or at any time prior to or since the 15th day of July, 1910, and still so fails, neglects and refuses, said defendant admits that it has refused to pay the said sum of Fifteen hundred (1,500) Dollars,, but denies that said first unit was ever installed or accepted, or that said sum of Fifteen Hundred (1500) Dollars has ever become due. [19]

Further answering unto said article, this defendant denies that by reason of said, or any, acts of the defendant, or by reason of defendant's failure to per-

form the terms or conditions of said agreement, plaintiff has been damaged in the sum of Thirty-one Hundred (3100) Dollars, or in any sum of money whatsoever, or at all.

Answering unto the second cause of action in said amended complaint set forth, this defendant denies that it is indebted to plaintiff for goods sold or delivered, or for labor or materials furnished by plaintiff to defendant, either at the special request of defendant, or otherwise, or that the said defendant is otherwise, or at all, indebted to said plaintiff; and further denies that the said alleged goods so sold or delivered or the labor or materials furnished by the plaintiff to said defendant, were of the reasonable value of Thirty-one Hundred (3100) Dollars, or any sum of money whatsoever.

### COUNTERCLAIM.

As a further defense, and by way of counterclaim and set-off to the said causes of action in said amended complaint set forth, this defendant alleges:

#### I.

That at all of the times hereinafter mentioned the plaintiff Westinghouse Electric and Manufacturing Company was, and now is, a corporation, organized and existing under and by virtue of the laws of the State of Pennsylvania, and is a citizen of the State of Pennsylvania. [20]

#### II.

That at all of the times hereinafter mentioned the defendant Samson Iron Works was, and now is, a corporation, organized and existing under and by virtue of the laws of the State of California and is a

citizen of the State of California.

III.

That on the 26th day of May, 1910, the said plaintiff and defendant made and entered into a certain written agreement, a copy of which is hereto attached, marked exhibit "A," and hereby referred to and made a part hereof.

That at the time of entering into said contract said plaintiff knew that the same was to be, and the same was then and there between said plaintiff and defendant intended to be an integral part of a contract then about to be entered into between the said defendant Samson Iron Works and one Z. S. Spaulding, of Portland, Oregon, for the installation of said electrical work in said contract mentioned, in the Spaulding Building, in Portland, Oregon, under the terms of which the said Samson Iron Works agreed to guarantee to complete the installation of said electrical work at the times and in the manner in said contract between said plaintiff and defendant set forth.

IV.

That notwithstanding, the plaintiff failed to have the first unit installed as in its said contract set forth by July 1st, 1910, as in its said contract agreed, and further failed and neglected to deliver the second 75 K. W. generator or the 100 K. W. generator in said contract set forth, within ninety days from the date of receipt of order, or at all.

V.

That in consequence of the failure of said plaintiff to keep and perform its said contract as hereinbefore set forth, the said [21] defendant was prevented

from completing the installation of the said electrical apparatus and appliances in the said Spaulding Building in Portland, Oregon, as in its said contract with said Spaulding set forth, and was otherwise put to large cost and expense in attempting to perform said contract, all to its loss and damage in the sum of Seven Thousand Six Hundred and Ninety-three and 34/100 (7,693.34) Dollars.

## VI.

That on the 6th day of September, 1910, this defendant notified the said plaintiff that the said Spaulding had by reason of the failure on the part of said plaintiff to carry out its portion of said contract, rescinded his contract with said defendant, Samson Iron Works, and that said defendant would hold said plaintiff liable for all loss and damage accruing therefrom; and thereafter, to wit, on the 12th day of September, 1910, said defendant rescinded its said contract with said plaintiff.

WHEREFORE, said defendant prays that said amended complaint be dismissed, and for its costs herein.

NATHAN H. FRANK,  
IRVING H. FRANK,

Attorneys for Defendant. [22]

State of California,  
County of San Joaquin,—ss.

J. M. Kroyer, being first duly sworn, deposes and says: That he is an officer of Samson Iron Works, a corporation, defendant in the above-entitled cause, to wit, the President thereof; that he *has the* foregoing answer and counterclaim, and knows the contents



thereof; that the same are true of his own knowledge, except as to the matters which are therein stated upon information and belief, and that as to those matters he believes them to be true.

J. M. KROYER.

Subscribed and sworn to before me this 11th day of February, 1913.

[Seal]

M. H. ORR,

Notary Public in and for the County of San Joaquin,  
State of California. [23]

**Exhibit "A" [to Answer to Amended Complaint  
and Counterclaim (Agreement Dated May 25,  
1910, Between Westinghouse Electric and Man-  
ufacturing Company and Samson Iron  
Works)].**

**EXHIBIT "A."**

**"WESTINGHOUSE ELECTRIC & MANUFAC-  
TURING COMPANY.**

**Proposal.**

**Pittsburg, Pa., May 25, 1910.**

**Samson Iron Works**

**(Hereinafter called the Purchaser),  
Stockton, Cal.**

**Gentlemen:**

Westinghouse Electric & Manufacturing Company (hereinafter called the Company), proposes to furnish the Purchaser, electric apparatus and appliances as specified below: All apparatus included herein is to be delivered and erected on foundations in the basement of the Spaulding Building, Portland, Oregon.



### 34 *Westinghouse Electric & Manufacturing Co.*

1-75 K. W., compound wound, direct current,  
E. T., three wire generator, 250-125 volts,  
265 R. P. M., complete with all three wire  
parts, and field rheostat.

The above generator is to be shipped immediately from San Francisco, Cal., and is to be furnished with a temporary switchboard, pending receipt of the complete switchboard, as specified below.

This generator with its gas engine will be considered as the first of three units which will be installed in the Spaulding Building. This first unit has to be in operation by July 1st, 1910, and it is agreed and understood that payment in the amount of \$1500.00 will be made on the total contract price, immediately upon installation and acceptance, which payment will not be made later than July 15, 1910.

1-75 K. W. compound wound, direct current,  
E. T. three wire generator, 250-125 volts,  
275 R. P. M., complete with all three wire  
parts and field rheostat.

1-100 K. W. compound wound, direct current,  
E. T. three wire generator, 250-125 volts,  
250 R. P. M., complete with all three wire  
parts and field rheostat.

For the control of all of the above generators, there will be furnished one (1) four panel type 5-D switchboard, consisting of three (3) genertor panels and one (1) load panel, all in accordance with specifications hereto attached.

Page 1.

There will also be furnished and installed in conduits to be laid by the Spaulding Building in the

Power House floor, all necessary cables in proper lengths and sizes for the complete connections from all generators to their respective switchboard panels, and also from the load panel to the main distribution panel.

All necessary and proper connections will be made from each generator to its respective generator panel with proper regard for multiple operation of all of these units.

#### DELIVERY.

Delivery of the second 75 K. W. generator and the 100 K. W. generator [24] will be made from our factory in approximately 90 days from date of receipt of order, with full and complete information.

#### TERMS.

Full payment for the second and third units as mentioned above, will be made immediately upon erection and acceptance, it being further agreed and understood that this payment shall not exceed 45 days from date of Bill of Lading, showing shipment from our factory, East Pittsburg.

If partial shipments are made of the second and third units, it is understood that payments will be made on the same basis as above in pro rata amounts of the total contract figure.

#### PERFORMANCE SPECIFICATIONS.

The operation of all of the above generators will be in accordance with specifications hereto attached.

#### PRICE.

The price of all of the above apparatus including freight, cartage, erection of generators on founda-

tions supplied by the Spaulding Building, installation and all connections to switchboard, necessary cables for same and delivery of the armatures of the second 75 K. W. and the 100 K. W. to the Samson Iron Works, Stockton, Cal., but not including pressing of the armatures on to the engine shafts, will be Seven Thousand Eight hundred and fifty 00/100 (\$7,850.00).

## Page 2.

## WESTINGHOUSE ELECTRIC &amp; MANUFACTURING COMPANY.

Pittsburg, Pa.

## PERFORMANCE SPECIFICATION.

Direct Current Engine Type Generator Three Wire.  
For SAMSON IRON WORKS—Spaulding Building—Date May 25, 1910.

No.

NORMAL (Full Load) Rating:

Item.	ber.	Kw.	Volts.	Amperes.	Winding.	Poles.	R. P. M.	Frame.	
								Vert.	Split
(a)	5830	75	250- 125	300	Compound	6	265		
(b)	5829	75	"	"	"	6	275	"	"
(c)	5840	100	"	400	"	6	250	"	"

[25]

## CONSTRUCTION.

General Description:—The armature and commutator will be built together upon a ventilated sleeve or spider and arranged to be pressed on the shaft. The field frame will be provided with screws and liners for adjusting its position. Foundation bolts are not included. Shaft keys are not included where the armature is to be pressed on engine shaft.

**FIELD:**—The field frame of these generators will be made of a high grade of iron or steel, sound and free from blow-holes. The poles will be made of laminated steel and so proportioned as to reduce the armature reaction. They will be bolted to the field frame and can be readily removed. For compound wound generators, the series and shunt field coils will be so proportioned as to automatically give the voltage indicated under “Regulation.” For shunt wound generators, the field coils will be so wound that voltage regulation can be obtained by means of a field rheostat. The coils will be insulated in a suitable manner with material which can be subjected to a temperature of 90 degrees Centigrade without injury.

**ARMATURE:**—The armature will be of the drum type with open slots for the winding. The coils will be interchangeable and will form a winding such that its circuits will not become unbalanced with the armature displaced as much as  $1/32$  inch from its geometrical centre. Before being placed in the slots the coils will be completely insulated in a substantial manner with material which can be subjected to a temperature of 90 degrees Centigrade without injury. The coils will be held in the slots by hard fibre wedges. The core will be built up of high grade laminated sheet steel of good magnetic quality.

**COMMUTATOR:**—The commutator will be built on an extension of the armature spider. It will be made of copper bars hard drawn to gauge and securely clamped in position. The bars will be thoroughly insulated by mica. The leads from the arma-



ture coils will be soldered to the necks of the commutator and each joint will have as great carrying capacity as the armature conductor.

**BRUSHES:**—The arms carrying the brushes will be strong and rigid and will be supported by a ring which may be shifted for adjusting the brushes. The brush holders will be of the sliding shunt type. Carbon brushes will be used, and they will be of such size and number as to carry all loads specified.

**VENTILATION:**—The armature spider, core and windings will be provided with ventilating spaces and the design will be such that the rotation of the armature will set up a forced circulation of air through them. Spaces will be left between the field coils, so that a free circulation of air will be obtained while the machine is in operation, and the ends of the armature coils will be so formed that the air will circulate freely through them.

Page 3.

## PERFORMANCE.

**COMMUTATION:**—The brushes having been once adjusted, there will be practically no sparking or burning of the brushes or blackening of the commutator within the limits of the time loads specified, nor will there be injurious sparking at the momentary overloads. [26]

**REGULATION:**—The regulation is based on a variation of speed in the prime mover of not more than 2 per cent. from no load to full load. A less amount of compounding can be obtained by adjusting a shunt to the series winding. The generators



covered by these specifications, however, should not be operated with a full load voltage less than 94 per cent of normal full load voltage, or a no load voltage higher than 92 per cent of normal full load voltage.

Item.	Commutation Without Shifting Brushes.		Regulation—Compound Wound Generators Only.	
	No Load to.	Momentarily.	No Load Voltage.	Full Load Voltage.
(a)	50% Overload	75% Overload	230	250
(b)	50% Overload	75% Overload	230	250
(c)	50% Overload	75% Overload	230	250

**EFFICIENCY:**—The efficiencies are to be calculated from the 12 R losses in the armature winding and field coils, brushes and rheostats, core loss and brush friction, these losses being measured separately and based on normal rated load, speed and voltage.

**TEMPERATURE:**—Temperatures are to be measured by thermometer, and for room temperatures other than 25 degrees Centigrade correction according to the Standardization Rules of the American Institute of Electrical Engineers will apply.

Efficiency Per Cent. Approx.				
Item.	$\frac{1}{2}$ Load.	$\frac{3}{4}$ Load.	Full Load.	$1\frac{1}{4}$ Load.
(a)	90.5	91.5	91.5	90.25
(b)	90.5	91.5	91.5	90.25
(c)	91	91.5	91.2	90.

Temperature Rise Deg. C.

Full Load	Followed by	Commutator May Rise Above Other	Momentary Over- load Without
24 Hours.	$1\frac{1}{4}$ Load for 2 Hours.	Parts.	Injury.
35	50	0	75%
35	50	0	75%
35	50	0	75%

**METHOD OF TEST:**—All tests will be conducted in accordance with the Standardization Rules of the American Institute of Electrical Engineers, and, when feasible, will take place at the Works of Westinghouse Electric & Manufacturing Company. On

all points not covered by the Rules of the A. I. E. E., the standard test rules of [27] Westinghouse Electric & Manufacturing Company will be followed. Where the temperature guarantee is for a period of 24 hours, it is understood that in making tests the run will be only for such length of time as is required to reach a constant temperature. When completed, the generators will be subjected to insulation tests in accordance with the rules of the A. I. E. E.

Page 4.

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WESTINGHOUSE ELECTRIC & MANUFACTURING COMPANY.

Pittsburg, Pa.

SWITCHBOARD INQUIRY AND DATA SHEET.

Three copies of this sheet, completely filled out, must accompany every switchboard contract or order; one copy will be attached to Purchaser's copy of contract.

May 25, 1910.

Switchboard for SAMSON IRON WORKS—  
Spaulding Building Portland, Oregon.

1. Name by which plant is known—Spaulding Building.
2. Kind of service—Light and Power (Elevators).  
(State whether lighting, power, etc., and if A. C. give per cent power factor, or failing this, the character and proportionate division of the load.)
3. Is there any other switchboard in this plant?  
No.

(If new switchboard must harmonize in design or appearance with any other switchboard, give on a separate sheet fullest description of same with all necessary center lines and dimensions, location of bus bars and other pertinent information. A sketch may be unnecessary. Give direction of rotation of rheostat hand wheels necessary to raise the voltage, finish of instruments, description of marble or slate panels, including bevels, with data or samples if it is necessary that panels should match closely.)

4. Finish of Board } Standard—Black Marine  
 ..... Marble, Shade  
 } Std. Black Marine...Slate  
 (Polished or any special finish require addition to standard price.)

5. Sequence of panels and general data (see also Panel Specification, Form P-1609):

(Panels to be numbered from left to right facing switchboard.)

Panel No.	Description of Apparatus or Circuit to be Controlled.	Do Leads Come to Panels From Above or Below?
1	75 K. W. three wire generator	
2	" "	
3	100 K. W. three wire generator	Below
4	Load panel for above.	
.....		
	Ground Leads	
.....		

[28]

For generators give size of each main, equalizer and field lead, marking same M., E. and F., respectively.

For transformers give size of each high tension and low tension lead, marking same H. T. and L. T., respectively.

For feeders give size of each trolley feeder for railway work and size of ground leads.

For non-grounded circuits give size of each outgoing lead.

If provision for Westinghouse Standard cables will be acceptable, mark simply "STD."

- (x) Only required where series transformers are located on cables, or cable bushings are to be provided for.

Page 5.

6. Operation of generators—In parallel.  
(State if "in parallel." If not, explain operation. If all panels and connections are not strictly standard, describe connections required and send rough diagram.)
7. Are generators separately excited?...
8. Do exciters operate in parallel with others?...
9. Must rheostats be proportioned to operate with an automatic voltage (Tirril) regulator? Yes.  
(See forms P-1045 and P-1046.)
10. Does purchaser insist that large rheostats and meter transformers be supported on rear of panels? No.  
(The Company's standard practice is to locate large rheostats and meter transformers apart from switchboard whenever necessary to make rear of panels accessible. Outline drawings will be sent to purchaser so that proper provision can be made. They will

not be mounted on rear of panels in such cases unless specially provided for.)

11. If feeder regulators are used, can they be operated in the same manner as sprocket operated rheostats? If not, indicate relative arrangement of regulators and panels.
12. Finish of meters and trimmings—Standard.  
(Special finish requires addition to standard price.)
13. Will purchaser require light load accuracy of integrating wattmeters, thus requiring separate series transformers, or can wattmeters be operated on series transformers with other meters?
14. Can any apparatus be operated from meter transformers now installed in plant?...
15. Will Westinghouse Automatic Synchronizer be required? . . .
16. Are we to adhere strictly to specifications? If not, how much may we deviate, and may we put in alternate propositions? . . .
17. Basis of proposition. . . .

(In making inquiry for quotation state maximum economy, meaning cheaper and fewer instruments, or best and most convenient layout, meaning highest grade of apparatus and as much apparatus as could perform useful functions, and often more liberal spacing.) [29]



DATA TO BE FILLED IN WHEN ORDER IS  
CLOSED.

18. Board is to be erected 48 inches from the wall.
19. Has full information noted under question 3 been sent? Yes.
20. Complete data regarding all rheostats and starting devices to be provided for. Has this been sent? . . .

(If these are not Westinghouse devices, send all necessary templates, drawings and dimensions with manufacturers' names and identifying data. If new face plate is wanted for resistance, give number of contracts, capacity in amperes, resistance, dimensions, name of manufacturer, and any other pertinent information. If rheostats are Westinghouse, identify same. For remote control rheostats fill out leaflet No. 2714 and attach hereto.)

21. Send drilling plans, data and all necessary dimensions on foreign apparatus. Has this been done? . . .
22. If apparatus is remote control, sufficient drawings, sketches and information must be sent to show location of apparatus and include enough data of floors and building details to make designs. Has this been sent? . . .
23. Will purchaser require any drawings for approval or erection? Yes—for erection.  
Shall the Company await approval of drawings before starting manufacture? No.
24. If D.C. Generators are to be provided for, are

series coils connected on the positive or negative side? Standard.

25. Does any panel ordered require special arrangement of apparatus? No.

(If special arrangement is desired send sketch.)

26. Are meters to be shipped with panels or are they to be held at factory until needed? With panels.

(If meters are received at destination some time before they are needed they may be damaged by rough handling or by condensation on the delicate mechanism causing corrosion. This is likely to occur if Purchaser has no adequate place to store them where temperature is sufficiently high and constant.)

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Form P-1609.

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Pittsburg, Pa.

### PANEL SPECIFICATION.

A specification must be filled out for each panel except where rating and amount of apparatus is identical with other panels.

There will be supplied Two Panels; Type 5-D, Style No. 23,033 marked on Data Sheet as Panels Nos. one and two, to be used for the control of 2-75 K.W. D.C. engine type three-wire generators. [30]

(Give capacity in kilowatts or horse-power of the circuit or apparatus controlled, with overload guarantee, also voltage, frequency and power factor (if known), together with name of maker of any apparatus controlled, and data for complete identification.)

Each Panel will be made up of three sections, the dimensions of which will be as follows:

Upper Section . . . . ft., 20 in. high, 32 in. wide and 2 in thick.

Middle Section . . . . ft., 45 in. high, 32 in. wide and 2 in thick.

Lower Section . . . . ft., 25 in. high, 32 in. wide and 2 in thick.

All front edges to have  $\frac{1}{2}$  inch bevels.

(See Price List No. 12528 for standard dimensions and bevels.)

Upon each of these panels will be mounted the following apparatus:

(Give complete identification of all apparatus, specifying capacity in amperes, volts and Type No., Style No., or Catalogue No. where these are available. Observe that the factory will require outline drawing and drilling template of all apparatus not furnished by Westinghouse Electric & Mfg. Co.)

Item.	Description.	Style No. or Catalogue No.
1	400 amp. type "C" two pole automatic circuit-breaker with equalizer contacts.	
2	500 amp. type "D" ammeters.	
1	Pilot lamp bracket and shade.	

- 1 Ground detector outfit.
- 1 Type "Q" rheostat handle and mounting.
- 1 Voltmeter plug receptacle.
- 2 300 amp. two pole single throw knife switches.
- 2 75 amp. two pole single throw knife switches for balancing coils.

NOTE:—Ground detector outfit will be furnished on first panel only.

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Form P-1609.

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Pittsburg, Pa.

#### PANEL SPECIFICATION.

A specification must be filled out for each panel except where rating and amount of apparatus is identical with other panels.

There will be supplied One Panel; Type 5-D, Style No. 23034 marked on Data Sheet as Panel No. three, to be used for the control of 1-100 K.W. D.C. engine type three-wire generator.

(Give capacity in kilowatts or horse-power of the circuit or apparatus controlled, with overload guarantee, also voltage, frequency and power factor (if known) together with name of maker of any apparatus controlled and data for complete identification.)

## 48 *Westinghouse Electric & Manufacturing Co.*

Each Panel will be made up of three sections, the dimensions of which will be as follows:

Upper Section . . . . ft., 20 in. high, 32 in. wide and 2 in thick.

Middle Section . . . . ft., 45 in. high, 32 in. wide and 2 in thick.

Lower Section . . . . ft., 25 in high, 32 in. wide and 2 in thick.

All front edges to have  $1\frac{1}{2}$  inch bevels.

(See Price List No. 12528 for standard dimensions and bevels.)

Upon each of these panels will be mounted the following apparatus:

(Give complete identification of all apparatus, specifying capacity in amperes, volts and Type No., Style No., or Catalogue No. where these are available. Observe that the factory will require outline drawing and drilling template of all apparatus not furnished by Westinghouse Electric & Mfg. Co.)

Item.	Description.	Style No. or Catalogue No.
1	400 ampere type "C" two pole automatic circuit-breaker with equalizer contacts.	
2	600 ampere type "D" ammeters.	
1	Pilot lamp, bracket and shade.	
1.	Type "Q" rheostat hand-wheel and mounting.	
1	Voltmeter plug receptacle.	
2	400 amp. two pole single throw knife switch.	
2	100 amp. two pole single throw knife switches for balancing coils.	



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Form P-1609.

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Pittsburg, Pa.

### PANEL SPECIFICATION.

A specification must be filled out for each panel except where rating and amount of apparatus is identical with other panels.

There will be supplied One Panel; Type 5-D, Style No. 45099 marked on Data Sheet as Panel No. four, to be used as a load panel.

(Give capacity in kilowatts or horse-power of the circuit or apparatus controlled, with overload guarantee, also voltage, frequency and power factor (if known), together with name of maker of any apparatus controlled and data for complete identification.)

Each Panel will be made up of three sections, the dimensions of which will be as follows:

Upper Section . . . . ft., 20 in. high, 24 in. wide and 2 in thick.

Middle Section . . . . ft., 45 in. high, 24 in. wide and 2 in thick.

Lower Section . . . . ft., 25 in. high, 24 in. wide and 2 in thick.

All front edges to have  $\frac{1}{2}$  inch bevels.

(See Price List No. 12528 for standard dimensions and bevels.) [32]

Upon each of these panels will be mounted the following apparatus:

50 *Westinghouse Electric & Manufacturing Co.*

(Give complete identification of all apparatus, specifying capacity in amperes, volts and Type No., Style No. or Catalogue No. where these are available. Observe that the factory will require outline drawing and drilling template of all apparatus not furnished by Westinghouse Electric Mfg. Co.)

Item.	Description.	Style No. or Catalogue No.
2	2000 ampere illuminated dial type "E" ammeters.	
1	1200 ampere three-wire integrating wattmeter.	

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Form P-1609.

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Pittsburg, Pa.

PANEL SPECIFICATION.

A specification must be filled out for each panel except where rating and amount of apparatus is identical with other panels.

There will be supplied . . . . . Panel . . . . . Type . . . . . Style No. . . . . marked on Data Sheet as Panel No. . . . ., to be used for the control of . . . . .

(Give capacity in kilowatts or horse-power of the circuit or apparatus controlled, with overload guarantee, also voltage, frequency and power factor (if known), together with name of maker of any apparatus controlled and data for complete identification.)

Each Panel will be made up of . . . . . sections, the dimensions of which will be as follows:

Upper Section . . . . ft. . . . in. high, . . . . in. wide  
and . . . . in. thick.

Middle Section . . . . ft. . . . in. high, . . . . in. wide  
and . . . . in. thick.

Lower Section . . . . ft. . . . in. high, . . . . in. wide  
and . . . . in. thick.

All front edges to have . . . . . inch bevels.

(See Price List No. 12528 for standard dimensions and bevels.)

Upon each of these panels will be mounted the following apparatus:

(Give complete identification of all apparatus, specifying capacity in amperes, volts and Type No., Style No., or Catalogue No. where these are available. Observe that the factory will require outline drawing and drilling template of all apparatus not furnished by Westinghouse Electric & Mfg. Co.) [33]

Item.	Description.	Style No. or Catalogue No.
	As extras will be furnished—	
	Mounted on bracket arms at one end of board will be—	
	2-300 volt type “E” illuminated dial voltmeters—	
	Mounted on bracket arms at the other end of the board will be—	
	2 type TD 125 automatic voltage regulators—	
	There will also be furnished all necessary buss bars and wiring on the back of the boards.	

## Page 10

1. All apparatus shall be installed by and at the expense of the Purchaser, unless otherwise expressly stipulated.

2. The Company guarantees that the apparatus herein specified will generate or utilize electrical energy to their rated capacities without undue heating and will do their work in a successful manner, provided they are kept in proper condition and operated under normal conditions, and the Purchaser supplies competent supervision for their operation. The Company agrees to correct, at its own expense, any defects of labor or material in said apparatus which may develop under normal and proper use within thirty days after the starting thereof, provided the Purchaser gives the Company immediate written notice of such defects, and the correction of such defects by the Company shall constitute a fulfillment of its obligations to the Purchaser hereunder.

3. In case it is elsewhere herein agreed that the Company shall erect the apparatus herein specified, it is with the distinct understanding that the Company is to furnish the said apparatus and the labor of the erection only, the Purchaser furnishing all foundations and masonry work, including grouting, supports, builders' or joiners' work, access to premises, excavation and making good again. It is also understood that the material and workmanship of such foundations, supports, etc., shall be first-class and adequate for the purpose intended.

4. The property in and title to the apparatus and the right to use the same under the pat-

ents of the Company shall not pass from the Company until all payments hereunder (including deferred payments and payments of notes and renewals thereof, if any) shall have been fully made in cash, and the apparatus herein specified shall remain the personal property of the Company whatever may be the mode of its attachment to the realty or other property, until fully paid for in cash, and the Purchaser agrees to perform all acts which may be necessary to perfect and assure retention of title to the said apparatus in the Company. If default is made in any of the payments in the manner and form and at the time herein specified, [34] the Company shall be entitled to the immediate possession of said apparatus and shall be free to enter the premises where such apparatus may be located and remove the same as its property, without prejudice to any further damages which the Company may suffer by reason of the purchaser's refusal or failure to surrender the apparatus when so required. (A resale of the apparatus herein specified or any part thereof or installation of the same, by the Purchaser, as agent or contractor for another shall not alter the effect and intent of the foregoing provisions, it being understood that the Company's rights may be enforced against the Purchaser's vendee or principal the same as they might have been enforced against the Purchaser if such resale or installation had not been made.)

5. In order to insure the Purchaser against any possible loss or expense by reason of adverse claims under patents based upon the use of any of the elec-



trical apparatus covered by this proposal, the Company guarantees that the Purchaser shall not be disturbed in the use of the said electrical apparatus by litigation based upon such adverse claims, and to that end the Company will, at its own expense, defend any and all suits or proceedings that may be instituted against the Purchaser for the infringement, or alleged infringement, of any patent or patents by the use of any of the said apparatus, provided such infringement shall consist in the use of said apparatus or parts thereof in the regular course of the Purchaser's business and provided the Purchaser be not in default in payments thereof, and gives to the Company immediate notice in writing of the institution of the suit or proceedings, and permits the Company through its counsel to defend the same, and gives all needed information, assistance and authority to enable the Company so to do; and thereupon in case of an award for damages the Company will pay such award, and in case of an injunction against the Purchaser the Company will pay to the Purchaser any loss or damages to the Purchaser's business caused by such injunction.

6. In consideration of the foregoing guarantee, the Purchaser covenants not to violate or infringe any of the United States Letters Patent relating to any of the apparatus herein specified which are controlled by the Company or under which the Company has the right to manufacture or sell any of such apparatus and not to contest the Company's title thereto or rights thereunder or the validity or scope thereof and also agrees that if any trolleys or controllers or parts of trolleys and controllers are cov-

ered or are to be covered by this proposal, the Purchaser will not use or permit others to use such trolleys or controllers, or parts of trolleys or parts of controllers, except when incorporated in and used as parts of such car equipments as the Purchaser had prior to July, 1, 1896, or of such additional car equipments as the Purchaser has since purchased or may hereafter purchase from the Company or from a manufacturer, duly licensed under the aforementioned patents (the license of the Purchaser to use such trolleys and controllers and parts thereof being expressly qualified as in this paragraph provided).

7. The Company shall not be held responsible or liable for any loss, damage, detention or delay caused by fire, strike, civil or military authority, or by insurrection or riot, or by any cause beyond its control, and the receipt of the apparatus by the Purchaser shall constitute acceptance for delivery and a waiver of any and all claims for loss or damage due to delay, but this shall not relieve the Company from the obligations specified in paragraph 2 of this page.

8. The Company will recommend engineers for service in installing and operating the apparatus herein specified if desired by the Purchaser, whose compensation shall not be less than \$7.00 per day, [35] each, and boarding and traveling expenses, all of which shall be paid by the Purchaser; it being understood and agreed that during the term of such service the said engineers shall be the Purchaser's employes, for whose acts the Company shall assume no responsibility.

9. The Purchaser shall provide and maintain, in the name of Westinghouse Electric & Manufacturing Company, sufficient insurance on the apparatus herein specified, against loss or damage by fire during the period between delivery and final payment, to cover the unpaid balance of the purchase price, and, failing so to do, no loss or damage by fire during the aforesaid period shall serve to relieve the Purchaser of any of the obligations imposed by this agreement.

10. In case the Company, under this proposal, furnishes oil, wire, cable or other material requiring special carriers (such as oil barrels, reels, etc.) then the Purchaser will pay to the Company, under the terms of this agreement, the value of such carriers in addition to the contract price. Upon return to the proper receiving point designated by the Company of such carriers in first-class condition, the Company will credit the Purchaser the full amount previously charged; provided, however, that invoice or memorandum and necessary shipping documents are promptly forwarded to the Company and return shipment is made within four months from the original date of shipment, charges prepaid.

PRICE:—As herein before specified.

TERMS as follows:—All payments shall be made in New York or Pittsburg funds and with reference to the bill of lading, in accordance with the following terms; and, in case partial shipments are made at different times, pro rata payments shall be made therefor. If shipment of the apparatus herein specified, or any material part thereof, is delayed from

any cause for which the Purchaser is directly or indirectly accountable, the date of completion of the apparatus by the Company shall be regarded as the date of shipment, in determining when payments for said apparatus are to be made, and the Company shall be entitled to receive reasonable compensation for storing the completed apparatus, which shall be held at the Purchaser's risk.

Fifty (50) per cent Sight Draft attached to Bill of Lading.

Forty (40) per cent Thirty (30) days from date of Bill of Lading.

Ten (10) per cent Sixty (60) days from date of Bill of Lading.

As herein before specified.

**SHIPMENT:**—The apparatus specified above will be shipped as follows:

As herein before specified.

**AGREEMENT:**—All previous communications between the parties hereto, either verbal or written, with reference to the subject matter of this proposal, are hereby abrogated, and this proposal, duly accepted and approved, constitutes the agreement between the parties hereto, and no modification of this agreement shall be binding upon the parties hereto, or either of them, unless such modification shall be in writing, duly accepted by the Purchaser and approved by an executive officer of the Company. [36]

The foregoing proposal must be accepted by the Purchaser within twenty (20) days from its date and must be approved by an executive officer of the



Company in order to make it binding upon the Company.

Respectfully yours,

WESTINGHOUSE ELECTRIC & MANUFACTURING COMPANY.

By CARL L. WERNICKE.

Approved: Pittsburg, Pa., July 18, 1910.

WESTINGHOUSE ELECTRIC & MANUFACTURING COMPANY.

By H. D. SHUTE,  
Acting Vice-president.

Witness J. C. DOLAN.

“ACCEPTANCE.

The foregoing proposal is hereby accepted at the prices and upon the terms and conditions named therein.

Dated May 26, 1910.

SAMSON IRON WORKS,

By S. H. HEAD,  
Sales Manager.

Witness: CARL L. WERNICKE.”

Receipt of a copy of the within Answer to Amended Complaint and Counter Claim is hereby admitted this 14th day of February, 1913.

J. C. CAMPBELL,  
Attorneys for Plaintiff.

[Endorsed]: Filed Feb. 14, 1913. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [37]



*In the District Court of the United States, in and for  
the Northern District of California, Division  
Two.*

No. 15,366.

WESTINGHOUSE ELECTRIC AND MANU-  
FACTURING COMPANY, a Corporation,  
Plaintiff,

vs.

SAMSON IRON WORKS, a Corporation,  
Defendant.

**Amendment to Answer and Counterclaim.**

Samson Iron Works, defendant above named, by leave of Court first obtained, files its amendment to the counterclaim in the above-entitled cause as follows:

By striking out the prayer in said counterclaim on page 4 thereof, and inserting in lieu thereof, the following:

WHEREFORE, the said defendant prays that said complaint be dismissed, and that judgment be rendered in favor of this defendant and against plaintiff in the sum of Seven Thousand Six Hundred and Ninety-three and  $34/100$  (7,693.34) Dollars, together with its interest from the 6th day of September, 1910, and costs, and for such other and further relief as the Court may deem proper in the premises.

NATHAN H. FRANK,  
IRVING H. FRANK,  
Attorneys for Defendant. [38]

State of California,

City and County of San Francisco,—ss.

J. M. Kroyer, being duly sworn, deposes and says: That he is an officer of Samson Iron Works, a corporation, defendant in the above-entitled cause, to wit, the President thereof; that he has read the foregoing amendment to the counterclaim, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated upon information and belief, and that as to those matters he believes it to be true.

J. M. KROYER.

Subscribed and sworn to before me this 12 day of June, 1914.

[Seal]

C. W. CALBREATH,

Deputy Clerk U. S. District Court Northern District of California.

Receipt of a copy of the within Amendment to Counterclaim is hereby admitted this 12th day of June, 1914.

J. C. CAMPBELL,

D. L. LEVY,

WALTER SHELTON,

Attorneys for Plaintiff.

[Endorsed]: Filed Jun. 12, 1914. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [39]

*In the Circuit Court of the United States, for the  
Ninth Circuit, Northern District of California.*

No. 15,366.

WESTINGHOUSE ELECTRIC & MANUFACTURING COMPANY, a Corporation,  
Plaintiff,

vs.

SAMSON IRON WORKS, a Corporation,  
Defendant.

**Cross-complaint.**

The defendant above named, Samson Iron Works, by way of Cross-complaint to the Complaint of the plaintiff in the above-entitled cause now on file herein, alleges as follows:

I.

That at all of the times hereinafter mentioned the said plaintiff, Westinghouse Electric & Manufacturing Company was, and now is, a corporation, organized and existing under and by virtue of the laws of the State of Pennsylvania, and is a citizen of the State of Pennsylvania.

II.

That at all of the times hereinafter mentioned the said defendant, Samson Iron Works, was, and now is, a corporation, organized and existing under and by virtue of the laws of the State of California, and is a citizen of the State of California.

III.

That on the 26th day of May, 1910, the said plaintiff and defendant made and entered into a certain

written agreement, a copy of which is hereto attached, marked exhibit "A," and hereby referred to and made a part hereof.

That at the time of entering into said contract said plaintiff [40] knew that the same was to be, and the same was then and there between said plaintiff and defendant intended to be, an integral part of a contract then about to be entered into between the said defendant Samson Iron Works and one Z. S. Spaulding, of Portland, Oregon, for the installation of said electrical work in said contract mentioned in the Spaulding Building, in Portland, Oregon, under the terms of which the said Samson Iron Works agreed to guarantee to complete the installation of said electrical work at the times and in the manner in said contract between said plaintiff and defendant set forth.

#### IV.

That notwithstanding the said plaintiff failed to have the first unit installed as in its said contract set forth by July 1st, 1910, as in its said contract agreed, and further failed and neglected to deliver the second K.W. Generator or the 100 K.W. Generator in said contract set forth, within ninety days from the date of receipt of order, or at all.

#### V.

That in consequence of the failure of said plaintiff to keep and perform its said contract as hereinbefore set forth, the said defendant was prevented from completing the installation of the said electrical apparatus and appliances in the said Spaulding Building in Portland, Oregon, as in its said contract with

said Spaulding set forth, and was otherwise put to large cost and expense in attempting to perform said contract, all to its loss and damage in the sum of Seven Thousand Six Hundred and Ninety-three and 34/100 (7,693.34) Dollars.

## VI.

That on the 6th day of September, 1910, this Cross-complainant notified said Westinghouse Electric & Manufacturing Company that [41] the said Spaulding had by reason of the failure on the part of the Westinghouse Electric & Manufacturing Company to carry out its portion of said contract rescinded his contract with the said Samson Iron Works, and that said Samson Iron Works would hold said Westinghouse Electric & Manufacturing Company liable for all loss and damage accruing therefrom; and thereafter, to wit, on September 12th, 1910, said defendant rescinded its said contract with said plaintiff.

WHEREOF, said Cross-complainant prays for judgment against said Westinghouse Electric & Manufacturing Company in the sum of Seven Thousand Six Hundred and Ninety-three and 34/100 (7,693.34) Dollars, together with interest thereon from the 6th day of September, 1910, and costs of suit.

NATHAN H. FRANK,  
IRVING H. FRANK,

Attorneys for Cross-complainant, Samson Iron  
Works. [42]



**Exhibit "A" [to Cross-complaint (Agreement Dated  
May 25, 1910, Between Westinghouse Electric  
and Mfg. Company and Samson Iron Works).]**

**EXHIBIT "A."**

**WESTINGHOUSE ELECTRIC & MANUFACTURING COMPANY.**

Proposal.

Duplicate.                      Pittsburg, Pa., May 25, 1910.  
Samson Iron Works.

(Hereinafter called the Purchaser),  
Stockton, Cal.

Gentlemen:

Westinghouse Electric & Manufacturing Company (hereinafter called the Company), proposes to furnish the Purchaser, electrical apparatus and appliances as specified below: All apparatus included herein is to be delivered and erected on foundations in the basement of the Spaulding Building, Portland, Oregon.

1—75 K.W., Compound wound, direct current, E. T., three wire generator, 250–125 volts, 265 R. P. M., complete with all three wire parts, and field rheostat.

The above generator is to be shipped immediately from San Francisco, Cal., and is to be furnished with a temporary switchboard, pending receipt of the complete switchboard as specified below.

This generator with its gas engine will be considered as the first of three units which will be installed in the Spaulding Building. This first unit has to be in operation by July 1st, 1910, and it is agreed

and understood that payment in the amount of \$1500.00 will be made on the total contract price, immediately upon installation and acceptance, which payment will not be made later than July 15, 1910.

1—75 K.W., compound wound, direct current, E.T., three wire generator, 250–125 volts, 275 R.P.M., complete with all three wire parts and field rheostat.

1—100 K. W. compound wound, direct current E.T. three wire generator, 250–125 volts, 250 R.P.M., complete with all three wire parts and field rheostat.

For the control of all of the above generators, there will be furnished One (1) four panel type 5-D switchboard, consisting of three (3) generator panels and one (1) load panel, all in accordance with specifications hereto attached.

There will also be furnished and installed in conduits to be laid by the Spaulding Building in the Power House floor, all necessary cables in proper lengths and sizes for the complete connections from all generators to their respective switchboard panels, and also from the load panel to the main distribution panel. [43]

All necessary and proper connections will be made from each generator to its respective generator panel with proper regard for multiple operation of all of these units.

#### DELIVERY.

Delivery of the second 75 K.W. generator and the 100 K.W. generator will be made from our factory in approximately 90 days from date of receipt of

order, with full and complete information.

### TERMS.

Full payment for the second and third units as mentioned above, will be made immediately upon erection and acceptance, it being further agreed and understood that this payment shall not exceed 45 days from date of Bill of Lading, showing shipment from our factory, East Pittsburg.

If partial shipments are made of the second and third units, it is understood that payments will be made on the same basis as above in pro rata amounts of the total contract figure.

### PERFORMANCE SPECIFICATIONS.

The operation of all of the above generators will be in accordance with specifications hereto attached.

### PRICE.

The price of all of the above apparatus including freight, cartage, erection of generators on foundations supplied by the Spaulding Building, installation and all connections to switchboard, necessary cables for same and delivery of the armatures of the second 75 K.W. and the 100 K.W. to the Samson Iron Works, Stockton, Cal., but not including pressing of the armatures on to the engine shafts, will be

Seven Thousand Eight Hundred and fifty 00/100 Dollars (\$7,850.00). [44]

# WESTINGHOUSE ELECTRIC & MANUFACTURING COMPANY.

Pittsburg, Pa.

## PERFORMANCE SPECIFICATION.

### DIRECT CURRENT ENGINE TYPE GENERATOR.

#### THREE WIRE.

For SAMSON IRON WORKS—Spaulding Building. Date May 25, 1910.  
No.

#### NORMAL (FULL LOAD) RATING:

##### Specification

Item.	Number.	Kw.	Volts.	Amperes.	Winding.	Poles.	R. P. M.	Frame.
(a)	5830	75	250— 125	300	compound	6	265	Vert. Split
(b)	5829	75	"	"	"	6	275	" "
(c)	5840	100	"	400	"	6	250	" "

#### CONSTRUCTION.

**GENERAL DESCRIPTION:**—The armature and commutator will be built together upon a ventilated sleeve or spider, and arranged to be pressed on the shaft. The field frame will be provided with screws and liners for adjusting its position. Foundation bolts are not included. Shaft Keys are not included where the armature is to be pressed on engine shaft.

**FIELD:**—The field frame of these generators will be made of a high grade of iron or steel, sound and free from blow holes. The poles will be made of laminated steel and so proportioned as to reduce the armature reaction. They will be bolted to the field frame and can be readily removed. For compound wound generators, the series and shunt field coils will be so proportioned as to automatically give the

voltage indicated under "Regulation." For shunt wound generators, the field coils will be so wound that voltage regulation can be obtained by means of a field rheostat. The coils will be insulated in a suitable manner with material which can be subjected to a temperature of 90 degrees Centigrade without injury.

**ARMATURE:**—The armature will be of the drum type with open slots for the winding. The coils will be interchangeable and will form a winding such that its circuits will not become unbalanced with the armature displaced as much as  $1/32$  inch from its geometrical center. Before being placed in the slots the coils will be completely insulated in a substantial manner with material which can be subjected to a temperature of 90 degrees Centigrade without injury. The coils will be held in the slots by hard fibre wedges. The core will be built up of high grade laminated sheet steel of good magnetic quality. [45]

**COMMUTATOR:**—The commutator will be built on an extension of the armature spider. It will be made of copper bars hard drawn to gauge and securely clamped in position. The bars will be thoroughly insulated by mica. The leads from the armature coils will be soldered to the necks of the commutator and each joint will have as great carrying capacity as the armature conductor.

**BRUSHES:**—The arms carrying the brushes will be strong and rigid and will be supported by a ring which may be shifted for adjusting the brushes. The brush holders will be of the sliding shunt type. Carbon brushes will be used, and they will be of such



size and number as to carry all loads specified.

**VENTILATION:**—The armature spider, core and windings will be provided with ventilating spaces and the design will be such that the rotation of the armature will set up a forced circulation of air through them. Spaces will be left between the field coils, so that a free circulation of air will be obtained while the machine is in operation, and the ends of the armature coils will be so formed that the air will circulate freely through them.

### PERFORMANCE.

**COMMUTATION:**—The brushes having been once adjusted, there will be practically no sparking or burning of the brushes or blackening of the commutator within the limits of the time loads specified, nor will there be injurious sparking at the momentary overloads.

**REGULATION:**—The regulation is based on a variation of speed in the prime mover of not more than 2 per cent from no load to full load. A less amount of compounding can be obtained by adjusting a shunt to the series winding. The generators covered by these specifications, however, should not be operated with a full load voltage less than 94 per cent of normal full load voltage, or a no load voltage higher than 92 per cent of normal full load voltage.

Item.	Commutation Without Shifting Brushes.		Regulation—Compound Wound Generators Only	
	No Load to.	Momentarily.	No Load Voltage.	Full Load Voltage.
(a)	50% Overload	75% Overload	230	250
(b)	50% Overload	75% Overload	230	250
(c)	50% Overload	75% Overload	230	250

**EFFICIENCY:**—The efficiencies are to be calculated from the 12 R losses in the armature winding and field coils, brushes and rheostats, core loss and brush friction, these losses being measured separately and based on normal rated load, speed and voltage.

**TEMPERATURE:**—Temperatures are to be measured by thermometer, and for room temperatures other than 25 degrees Centigrade corrections according to the Standardization Rules of the American Institute of Electrical Engineers will apply.

[46]

Item.	Efficiency Per Cent Approx.				Temperature Rise Deg. C. Followed by		Commuta- tor May Rise	Momen- tary Over- load Without Injury.
	$\frac{1}{2}$	$\frac{3}{4}$	Full	$1\frac{1}{4}$	Full	$1\frac{1}{4}$	Above	
	Load.	Load.	Load.	Load	Load	Load	Other	
					24 Hours.	for 2 Hours.	Parts.	
(a)	90.5	91.5	91.5	90.25	35	50	0	75%
(b)	90.5	91.5	91.5	90.25	35	50	0	75%
(c)	91	91.5	91.2	90	35	50	0	75%

**METHOD OF TEST:**—All tests will be conducted in accordance with the Standardization Rules of the American Institute of Electrical Engineers, and, when feasible, will take place at the Works of Westinghouse Electric & Manufacturing Company. On all points not covered by the Rules of the A. I. E. E., the standard test rules of Westinghouse Electric & Manufacturing Company will be followed. Where the temperature guarantee is for a period of 24 hours, it is understood that in making tests the run will be only for such length, of time as is required to reach a constant temperature. When completed, the generators will be subjected to insulation tests in accordance with the Rules of the A. I. E. E. [47]

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WESTINGHOUSE ELECTRIC & MANUFACTURING COMPANY.

Pittsburg, Pa.

SWITCHBOARD INQUIRY AND DATA  
SHEET.

Three copies of this sheet, completely filled out, must accompany every switchboard contract or order; one copy will be attached to Purchaser's copy of contract.

May 25, 1910.

Switchboard for SAMSON IRON WORKS—  
Spaulding Building, Portland, Oregon.

1. Name by which the plant is known—Spaulding Building.
2. Kind of service—Light and power (Elevators).  
(State whether lighting, power, etc., and if A. C. give per cent power factor, or failing this, the character and proportionate division of the load.)
3. Is there any other switchboard in this plant?  
No.

(If new switchboard must harmonize in design or appearance with any other switchboard, give on a separate sheet fullest description of same with all necessary center lines and dimensions, location of bus bars and other pertinent information. A sketch may be necessary. Give direction of rotation of rheostat hand wheels necessary to raise the voltage, finish of instruments, description of

marble or slate panels including bevels, with data or samples if it is necessary that panels should match closely.)

4.    Finish of Board
- {

Standard—Black Marine  
..... Marble, Shade  
Std. Black Marine Slate

(Polished or any special finish require addition to standard price.)

5.    Sequence of panels and general data (see also Panel Specification, Form P-1609):

(Panels to be numbered from left to right facing switchboard.    [48])

Panel No.	Description of Apparatus or Circuit to be Controlled.	No. of Conductors per Lead. #	:Data for Panel Terminals:			Do Leads Come to Panels from Above or Below?
			Solid or Stranded.	Area of Cable in Circ. Mills. (#)	Diameter	

- 1    75 K. W. three-wire generator.
- 2    “    “    “    “
- 3    100 K. W. three-wire generator.    Below
- 4    Load Panel for above.

Ground Leads.

# For generators give size of each main, equalizer and field lead, marking same M., E. and F., respectively.

For transformers give size of each high tension and low tension lead, marking same H. T. and L. T., respectively.

For feeders give size of each trolley feeder for railway work and size of ground leads.

For non-grounded circuits give size of each outgoing lead.

If provision for Westinghouse Standard cables will be acceptable mark simply "STD."

(#) Only required where series transformers are located on cables, or cable bushings are to be provided for.

6. Operation of Generators—In parallel.

(State if "in parallel." If not, explain operation. If all panels and connections are not strictly standard, describe connections required and send rough diagram.)

7. Are generators separately excited?

8. Do exciters operate in parallel with others?

9. Must Rheostats be proportioned to operate with an automatic voltage (Tirril) Regulator? Yes.

(See forms P-1045 and P-1046.)

10. Does purchaser insist that large rheostats and meter transformers be supported on rear of panels? No.

(The Company's standard practice is to locate large rheostats and meter transformers apart from switchboard wherever necessary to make rear of panels accessible. Outline drawings will be sent to purchaser so that proper provision can be made. They will not be mounted on rear of panels in each case unless specially provided for.)

11. If feeder regulators are used, can they be operated in the same manner as sprocket operated rheostats? If not, indicate relative arrangements of regulators and panels. [49]

12. Finish of Meters and trimmings—Standard (Special finish requires addition to standard price.)



13. Will purchaser require light load accuracy of integrating wattmeters, thus requiring separate series transformers, or can wattmeters be operated on series transformers with other meters? . . .
14. Can any apparatus be operated from meter transformers now installed in plant? . . .
15. Will Westinghouse Automatic Synchronizer be required? . . .
16. Are we to adhere strictly to specifications? If not, how much may be deviate, and may we put in alternate propositions? . . .
17. Basis of Proposition. . . .

(In making inquiry for quotation state maximum economy, meaning cheaper and fewer instruments, or best and most convenient layout, meaning highest grade of apparatus and as much apparatus as could perform useful functions, and often more liberal spacing.)

# DATA TO BE FILLED IN WHEN ORDER IS CLOSED.

18. Board is to be erected...48...inches from the wall.
19. Has full information noted under question 3 been sent. Yes.
20. Complete data regarding all rheostats and starting devices to be provided for—Has this been sent? . . .

(If these are not Westinghouse devices, send all necessary templates, drawings and dimensions with manufacturers' names and

identifying data. If new face plate is wanted for resistance, give number of contracts, capacity in amperes, resistance, dimensions, name of manufacturer, and any other pertinent information. If rheostats are Westinghouse, identify same. For remote control rheostats fill out leaflet No. 2714 and attach hereto.)

21. Send drilling plans, data and all necessary dimensions on foreign apparatus—Has this been done? . . .
22. If apparatus is remote control, sufficient drawings, sketches and information must be sent to show location of apparatus and include enough data of floors and building details to make designs. Has this been sent? . . .
23. Will purchaser require any drawings for approval or erection? Yes—for erection.  
Shall the Company await approval of drawings before starting manufacture? No. [50]
24. If D. C. Generators are to be provided for, are series coils connected on the positive or negative side? STANDARD.
25. Does any panel ordered require special arrangement of apparatus? No.  
(If special arrangement is desired, send sketch.)
26. Are meters to be shipped with panels or are they to be held at factory until needed? WITH PANELS.  
(If meters are received at destination some time before they are needed, they may be

damaged by rough handling or by condensation on the delicate mechanism causing corrosion. This is likely to occur if purchaser has no adequate place to store them where temperature is sufficiently high and constant.) [51]

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Pittsburg, Pa.

### PANEL SPECIFICATION.

A specification must be filled out for each panel except where rating and amount of apparatus is identical with other panels.

There will be supplied Two Panels; Type 5-D, Style No. 23033 marked on Date Sheet as Panels Nos. one and two, to be used for the control of 2-75 K. W. D. C. engine type three wire generators.

(Give capacity in kilowatts or horse-power of the circuit or apparatus controlled, with overload guarantee, also voltage, frequency and power factor (if known), together with name of maker of any apparatus controlled and data for complete identification.

Each Panel will be made up of three sections, the dimensions of which will be as follows:

Upper Section . . . . ft., 20 in. high, 32 in. wide and 2 in. thick.

Middle Section . . . . ft., 45 in. high, 32 in. wide and 2 in. thick.

Lower Section . . . . ft., 25 in. high, 32 in. wide and 2 in. thick.

All front edges to have 1/2 inch bevels.

(See Price List No. 12528 for standard dimensions and bevels.)

Upon each of these Panels will be mounted the following apparatus:

(Give complete identification of all apparatus, specifying capacity in amperes, volts and type No., Style No., or Catalogue No. where these are available. Observe that the factory will require outline drawing and drilling template of all apparatus not furnished by Westinghouse Electric & Mfg. Co.)

Item.	Description.	Style No. or Catalogue No.
1	400 amp. type "C" two pole automatic circuit-breaker with equalizer contacts.	
2	500 amp. type "D" ammeteres.	
1	Pilot lamp bracket and shade.	
1	Ground Detector outfit.	
1	type "Q" rheostat handle and mounting.	
1	Voltmeter plug receptacle.	
2	300 amp. two pole single throw knife switches.	
2	75 amp. two pole single throw knife switches for balancing coils.	

NOTE—Ground detector outfit will be furnished on first panel only. [52]

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PANEL SPECIFICATION.

A specification must be filled out for each panel except where rating and amount of apparatus is identical with other panels.

There will be supplied One Panel; Type 5-D, Style No. 23034 marked on Data Sheet as Panel No. three, to be used for the control of 1-100 K. W. D. C. engine type three wire generator.

(Give capacity in kilowatts or horse-power of the circuit or apparatus controlled, with overload guarantee, also voltage, frequency and power factor (if known), together with name of maker of any apparatus controlled and data for complete identification.)

Each Panel will be made up of three sections, the dimensions of which will be as follows:

Upper Section . . . . ft., 20 in. high, 32 in. wide and 2 in. thick.

Middle Section . . . . ft., 45 in. high, 32 in. wide and 2 in. thick.

Lower Section . . . . ft., 25 in. high, 32 in. wide and 2 in. thick.

All front edges to have 1/2 inch bevels.

(See Price List No. 12528 for standard dimensions and bevels.)

Upon each of these Panels will be mounted the following apparatus:



(Give complete identification of all apparatus, specifying capacity in amperes, volts and Type No., Style No., or Catalogue No. where these are available. Observe that the factory will require outline drawing and drilling template of all apparatus not furnished by Westinghouse Electric & Mfg. Co.)

Item.	Description.	Style No. or Catalogue No.
1	400 ampere type "C" two pole automatic circuit-breaker with equalizer contacts.	
2	600 ampere type "D" ammeters.	
1	Pilot lamp bracket and shade.	
1	Type "Q" rheostat hand wheel and mounting.	
1	Voltmeter plug receptacle.	
2	400 amp. two pole single throw knife and switch.	
2	100 amp. two pole single throw knife switches for balancing coils.	

[53]

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### PANEL SPECIFICATION.

A specification must be filled out for each panel except where rating and amount of apparatus is identical with other panels.

There will be supplied One Panel; Type 5-D, Style

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No. 45099 marked on Data Sheet as Panel No. four, to be used as a load panel.

(Give capacity in kilowatts or horse-power of the circuit or apparatus controlled, with overload guarantee, also voltage, frequency and power factor (if known), together with name of maker of any apparatus controlled and date for complete identification.)

Each Panel will be made up of three sections, the dimensions of which will be as follows:

Upper Section — ft., 20 in. high, 24 in. wide and 2 in. thick.

Middle Section — ft., 45 in high, 24 in. wide and 2 in. thick.

Lower Section — ft., 25 in. high, 24 in. wide and 2 in. thick.

All front edges to have 1/2 inch bevels.

(See Price List No. 12528 for standard dimensions and bevels.)

Upon each of these Panels will be mounted the following apparatus:

(Give complete identification of all apparatus, specifying capacity in amperes, volts and Type No., Style No., or Catalogue No. where these are available. Observe that the factory will require outline drawing and drilling template of all apparatus not furnished by Westinghouse Electric & Mfg. Co.)

Item.	Description.	Style No. or Catalogue No.
2	2000 ampere illuminated dial type "E" ammeters.	
1	1200 ampere three wire integrating watt- meter. [54]	

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TURING COMPANY.  
Pittsburg, Pa.

### PANEL SPECIFICATION.

A specification must be filled out for each panel ex-  
cept where rating and amount of apparatus is  
identical with other panels.

There will be supplied . . . . . Panel . . . . .; Type  
. . . . . Style No. . . . . marked on Data Sheet as  
Panel No. . . . ., to be used for the control of  
. . . . .

(Give capacity in Kilowatts or horse-power of  
the circuit or apparatus controlled, with  
overload guarantee, also voltage, frequency  
and power factor (if known), together with  
name of maker of any apparatus controlled  
and data for complete identification.)

Each Panel will be made up of . . . . . sections, the  
dimensions of which will be as follows:

Upper Section . . . . ft. . . . in. high, . . . . in. wide  
and . . . . in. thick.

Middle Section . . . . ft. . . . in. high, . . . . in. wide  
and . . . . in. thick.

Lower Section . . . . ft. . . . in. high, . . . . in. wide  
and . . . . in. thick.

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All front edges to have . . . . inch bevels.

(See Price List No. 12528 for standard dimensions and bevels.)

Upon each of these Panels will be mounted the following apparatus:

(Give complete identification of all apparatus specifying capacity in amperes, volts and Type No., Style No., or Catalogue No. where these are available. Observe that the factory will require outline drawing and drilling template of all apparatus not furnished by Westinghouse Electric & Mfg. Co.)

Item.	Description.	Style No. or Catalogue No.
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As extras will be furnished—

Mounted on bracket arms at one end  
of the board will be—

2—300 volt type “E” illuminated dial  
voltmeters.

Mounted on bracket arms at the other  
end of the board will be—

2—Type TD 125 automatic voltage regu-  
lators.

There will also be furnished all necessary bus bars  
and wiring on the back of the boards. [55]

1. All apparatus shall be installed by and at the  
expense of the Purchaser, unless otherwise expressly  
stipulated.

2. The Company guarantees that the apparatus  
herein specified will generate or utilize electrical  
energy to their rated capacities without undue heat-  
ing and will do their work in a successful manner,

provided they are kept in proper condition and operated under normal conditions, and the Purchaser supplies complete supervision for their operation. The Company agrees to correct, at its own expense, any defects of labor or material in said apparatus which may develop under normal and proper use within thirty days after the starting thereof, provided the Purshaser gives the Company immediate written notice of such defects, and the correction of such defects by the Company shall constitute a fulfillment of its obligations to the Purchaser hereunder.

3. In case it is elsewhere herein agreed that the Company shall erect the apparatus herein specified, it is with the distinct understanding that the Company is to furnish the said apparatus and the labor of the erection only, the Purchaser furnishing all foundations and masonry work, including grouting, supports, builders' or joiners' work, access to premises, excavating and making good again. It is also understood that the material and workmanship of such foundations, supports, etc., shall be first-class and adequate for the purpose intended.

4. The property in and title to the apparatus and the right to use the same under the patents of the Company shall not pass from the Company until all payments hereunder (including deferred payments and payments of notes and renewals thereof, if any) shall have been fully made in cash, and the apparatus herein specified shall remain the personal property of the Company, whatever may be the mode of its attachment to the realty or other property, until fully paid for in cash, and the Purchaser agrees to



perform all acts which may be necessary to perfect and assure retention of title to the said apparatus in the Company. If default is made in any of the payments in the manner and form and at the time herein specified the Company shall be entitled to the immediate possession of said apparatus and shall be free to enter the premises where such apparatus may be located and remove the same as its property, without prejudice to any further damages which the Company may suffer by reason of the Purchaser's refusal or failure to surrender the apparatus when so required. (A resale of the apparatus herein specified or any part thereof or installation of the same, by the Purchaser, as agent or contractor for another shall not alter the effect and intent of the foregoing provisions, it being understood that the Company's rights may be enforced against the Purchaser's vendee or principal the same as they might have been enforced against the purchaser if such resale or installation had not been made.)

5. In order to insure the Purchaser against any possible loss or expense by reason of adverse claims under patents based upon the use of any of the electrical apparatus covered by this proposal, the Company guarantees that the Purchaser shall not be disturbed in the use of the said electrical apparatus by litigation based upon such adverse claims, and to that end the Company will, at its own expense, defend any and all suits or proceedings that may be instituted against the Purchaser for the infringement, or alleged infringement, or any patent or patents by the use of any of the said apparatus, provided such in-

fringement shall consist in the use of said apparatus or parts thereof in the regular course of the Purchaser's business and provided the Purchaser be not in default in payments thereof, and gives to the Company immediate notice in writing of the institution of the suit or proceedings, and permits the Company [56] through its counsel to defend the same, and gives all needed information, assistance and authority to enable the Company so to do; and thereupon in case of an award for damages the Company will pay such award, and in case of an injunction against the Purchaser the Company will pay to the Purchaser any loss or damages to the Purchaser's business caused by such injunction.

6. In consideration of the foregoing guarantee, the Purchaser covenants not to violate or infringe any of the United States Letters Patent relating to any of the apparatus herein specified which are controlled by the Company or under which the Company has the right to manufacture or sell any of such apparatus and not to contest the Company's title thereto or rights thereunder or validity or scope thereof and also agrees that if any trolleys or controllers or parts of trolleys and controllers are covered or are to be covered by this proposal, the Purchaser will not use or permit others to use such trolleys or controllers, or parts of trolleys or parts of controllers, except when incorporated in and used as parts of such car equipment as the Purchaser had prior to July 1, 1896, or of such additional car equipments as the Purchaser has since purchased or may hereafter purchase from the Company or from a

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manufacturer duly licensed under the aforementioned patents (the license of the Purchaser to use such trolleys and controllers and parts thereof being expressly qualified as in this paragraph provided.)

7. The Company shall not be held responsible or liable for any loss, damage, detention or delay caused by fire, strike, civil or military authority, or by insurrection or riot, or by any cause beyond its control, and the receipt of the apparatus by the Purchaser shall constitute acceptance for delivery and a waiver of any and all claims for loss or damage due to delay, but this shall not relieve the Company from the obligations specified in paragraph 2 of this page.

8. The Company will recommend engineers for service in installing and operating the apparatus herein specified if desired by the Purchaser, whose compensation shall not be less than \$7.00 per day, each, and boarding and traveling expenses, all of which shall be paid by the purchaser; it being understood and agreed that during the term of such service the said engineers shall be the Purchaser's employees' for whose acts the Company shall assume no responsibility.

9. The Purchaser shall provide and maintain, in the name of Westinghouse Electric & Manufacturing Company, sufficient insurance on the apparatus herein specified, against loss or damage by fire during the period between delivery and final payment, to cover the unpaid balance of the purchase price, and, failing so to do, no loss or damage by fire during the aforesaid period shall serve to relieve the Purchaser of any of the obligations imposed by this agreement.

10. In case the Company, under this proposal, furnishes oil, wire, cable or other material requiring special carriers (such as oil barrels, reels, etc.), then the Purchaser will pay to the Company, under the terms of this agreement, the value of such carriers in addition to the contract price. Upon return to the proper receiving point designated by the Company of such carriers in first-class condition, the Company will credit the Purchaser the full amount previously charged; provided, however, that invoice or memorandum and necessary shipping documents are promptly forwarded to the Company and return shipment is made within four months from the original date of shipment, charges prepaid. [57]

PRICE: As hereinbefore specified.

TERMS as follows: All payments shall be made in New York or Pittsburg funds and with reference to the bill of lading, in accordance with the following terms; and, in case partial shipments are made at different times, pro rata payments shall be made therefor. If shipment of the apparatus herein specified, or any material part therefor, is delayed from any cause for which the Purchaser is directly or indirectly accountable, the date of completion of the apparatus by the Company shall be regarded as the date of shipment, in determining when payments for said apparatus are to be made, and the Company shall be entitled to receive reasonable compensation for storing the completed apparatus, which shall be held at the Purchaser's risk.

Fifty (50) per cent Sight Draft attached to Bill of Lading.



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Forty (40) per cent Thirty (30) days from date of Bill of Lading.

Ten (10) per cent Sixty (60) days from date of Bill of Lading.

As herein before specified.

SHIPMENT: The apparatus specified above will be shipped as follows:

As herein before specified.

AGREEMENT: All previous communications between the parties hereto, either verbal or written, with reference to the subject matter of this proposal are hereby abrogated, and this proposal, duly accepted and approved, constitutes the agreement between the parties hereto, and no modification of this agreement shall be binding upon the parties hereto, or either of them, unless such modification shall be in writing, duly accepted by the Purchaser and approved by an executive officer of the Company.

The foregoing proposal must be accepted by the Purchaser within twenty (20) days from its date and must be approved by an executive officer of the Company in order to make it binding upon the Company.

Respectfully yours,

WESTINGHOUSE ELECTRIC & MANUFACTURING COMPANY,

By CARL L. WERNICKE.

Approved: Pittsburg, Pa., July 18, 1910.

WESTINGHOUSE ELECTRIC & MANUFACTURING COMPANY,

By H. D. SHUTE,

Acting Vice-president.

Witness: J. — DOLAN.



ACCEPTANCE.

The foregoing proposal is hereby accepted at the prices and upon the terms and conditions named therein.

SAMSON IRON WORKS,

By S. H. HEAD,  
Sales Manager.

Dated May 26, 1910.

Witness: CARL L. WERNICKE. [58]

State of California,

City and County of San Francisco,—ss.

J. M. Kroyer, being first duly sworn, deposes and says: That he is an officer of Samson Iron Works, a corporation, defendant and cross-complainant in the above-entitled cause, to wit, the President thereof; that he has read the foregoing cross-complaint, and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated upon information and belief, and that as to those matters he believes it to be true.

J. M. KROYER.

Subscribed and sworn to before me this 13th day of October, 1911.

[Seal]

CHARLES EDELMAN,  
Notary Public in and for the City and County of San Francisco, State of California.

My commission expires April 9th, 1914.

Receipt of a copy of the within cross-complaint is hereby acknowledged this 16th day of October, 1911.

J. C. CAMPBELL,  
Attorney for Plaintiff.

[Endorsed]: Filed Oct. 16, 1911. Southard Hoffman, Clerk. By J. A. Schaertzer, Deputy Clerk.  
[59]

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*In the Circuit Court of the United States, Ninth Circuit,  
Northern District of California,*

No. 15,366.

WESTINGHOUSE ELECTRIC AND MANUFACTURING COMPANY (a Corporation),  
Plaintiff,

vs.

SAMSON IRON WORKS (a Corporation),  
Defendant.

**Plaintiff's Answer to Defendant's Cross-complaint.**

Now comes the plaintiff, and for answer to the cross-complaint of defendant on file herein, alleges and denies as follows:

I.

Denies that on the 26th day of May, 1910, the said plaintiff and defendant made or entered into a certain written agreement a copy of which is attached to said cross-complaint, marked exhibit "A" and referred to and made a part thereof, or entered into any agreement whatever, but alleges in this behalf that said plaintiff and said defendant and cross-complainant made and entered into a certain written agreement as in paragraph III of the complaint herein set forth.

II.

Denies that at the time of entering into said alleged contract, or at any other time, or at all, said

plaintiff knew that the same was to be, or that the same was then or there, or at any time, or at all, between said plaintiff and said [60] defendant and cross-complainant, intended to be an integral part, or any part, of a contract then about to be entered into between said defendant and cross-complainant and one Z. S. Spaulding of Portland, Oregon, for the installation of said electrical or any work in said alleged contract mentioned in the Spaulding Building in Portland, Oregon, or of any contract. Alleges that plaintiff has no information or belief upon the subject sufficient to enable it to answer the same and placing its denial upon that ground denies, that under the terms of said alleged contract, or of any contract, said Samson Iron Works agreed with said Spaulding to guarantee to complete the installation of said electrical work at the times or in the manner in said alleged contract between said plaintiff and said defendant and cross-complainant set forth, or at any time or in any manner or at all.

### III.

Denies that said plaintiff failed to have the First Unit installed as in said alleged contract set forth by July 1st, 1910, as in its said alleged contract agreed, or by any time or at all so failed; or that plaintiff further failed or neglected or at all failed or neglected to deliver the Second K. W. Generator or the 100 K. W. Generator, in said alleged contract set forth, within ninety days from the date of receipt of order.

### IV.

Denies that in consequence of the alleged failure of said plaintiff to keep or perform its said alleged

contract as in said Cross-complaint set forth, or in consequence or by reason of any fault, failure or neglect of said plaintiff, the said defendant and cross-complainant was prevented from completing the [61] installation of the said electrical apparatus or appliances in the said Spaulding Building in Portland, Oregon, as in its said alleged contract with said Spaulding set forth, or from completing the installation of any electrical apparatus or appliances, or was at all so prevented, or that defendant and cross-complainant was otherwise or at all put to large cost and expense, or any cost or expense in attempting to perform said alleged contract, or in any other manner, to its loss or damage in the sum of \$7,693.34, or to its loss or damage in any sum whatsoever.

## V.

Denies that on the 6th day of September, 1910, or at any time or at all, defendant and cross-complainant notified said Westinghouse Electric and Manufacturing Company that said Spaulding had by reason of the failure on the part of the Westinghouse Electric and Manufacturing Company to carry out its portion of said alleged contract, or at all, through the fault, failure or neglect of said plaintiff, rescinded its said alleged contract with the said Samson Iron Works.

## VI.

Further answering, plaintiff alleges that on or about the 25th day of August, 1910, and before the time set in said contract in said complaint set forth for delivery of the second and third units, said defendant and cross-complainant notified said plaintiff



that said defendant and cross-complainant would not accept plaintiff's generator nor any other part of plaintiff's machinery, and that the said contract in said complaint set forth was void and of no effect.

WHEREFORE, plaintiff prays that defendant's cross-complaint be dismissed, and for judgment as in the complaint herein prayed for, and for its costs herein incurred.

J. C. CAMPBELL,  
Attorney for Plaintiff. [62]

United States of America,  
Northern District of California,  
City and County of San Francisco,—ss.

W. W. Briggs, being first duly sworn, deposes and says: That the within-named plaintiff, the Westinghouse Electric and Manufacturing Company, is a corporation and that said affiant is an officer of said corporation, to wit, the managing agent thereof, and that he makes this affidavit for and on behalf of said plaintiff corporation. That he has read the foregoing answer to defendant's cross-complaint in the within-entitled action and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated upon information or belief, and that as to those matters he believes it to be true.

W. W. BRIGGS,

Subscribed and sworn to before me this 24th day of November, 1911.

[Seal]

FLORA HALL,  
Notary Public, in and for the City and County of San Francisco, State of California.



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[Endorsed]: Filed Nov. 24, 1911. Southard Hoffman, Clerk. By J. A. Schaertzer, Deputy Clerk.  
[63]

*In the District Court of the United States, in and for  
the Northern District of California, Division Two.*

No. 15,366.

WESTINGHOUSE ELECTRIC AND MANUFACTURING COMPANY (a Corporation),  
Plaintiff,

vs.

SAMSON IRON WORKS (a Corporation),  
Defendant.

**Amended Bill of Items.**

To Defendant Herein and to Its Attorneys:

You and each of you will please take notice that plaintiff herein tenders its Bill of Items in the above-entitled action in pursuance of the demand for a Bill of Items heretofore made by defendant, as follows:

FIRST CAUSE OF ACTION:

One (1) generator, together with temporary switchboard .....		\$1,500.00
Cable .....		330.50
Bed-plates .....		90.00
The cost of building the 1-4 Panel type 5-D switchboard consisting of 3 generator panels and 1 load panel called for in contract set forth in amended complaint was.....	\$1,531.65	
This apparatus was dismantled by plaintiff and most of the materials therein were turned into stock and used again, of the value of.....	\$1,253.80	
Part of said material was scrapped, of the value of.....	14.03	1,267.83
Loss suffered in dismantling switchboard.....	\$ 263.82	263.82

Amount allowed for 1-4 type 5-D switchboard consisting of 3 generator panels and one load panel called for by said contract in figuring total contract price.....	\$1,899.20	
Cost of construction of same.....	1,531.65	
Profit which would have been made had contract been performed.....	\$ 367.55	367.55
Total .....		\$2,551.87

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SECOND CAUSE OF ACTION:

Contract price .....		\$7,850.00
Less total of following:		
2d and 3d generators not delivered.....	\$2,477.67	
Freight on same not incurred .....	305.60	
Switchboard not delivered.....	1,267.83	
Freight on same not incurred.....	100.80	4,151.90
		<hr/>
		\$3,698.10

Dated April 23, 1914.

J. C. CAMPBELL and  
DAVID L. LEVY,  
Attorneys for Plaintiff.

Receipt of a copy of the within acknowledged this  
23d day of April, 1914.

NATHAN H. FRANK,  
IRVING H. FRANK,  
Defts. Attorneys.

[Endorsed]: Filed May 15, 1914. W. B. Maling,  
Clerk. By C. W. Calbreath, Deputy Clerk. [65]

*In the District Court of the United States, in and for  
the Northern Division of California, Division Two.*

No. 15,366.

WESTINGHOUSE ELECTRIC AND MANUFACTURING COMPANY (a Corporation),  
Plaintiff,

vs.

SAMSON IRON WORKS (a Corporation),  
Defendant.

**Amendment to Amended Bill of Items.**

On page 1 thereof, strike out caption "FIRST CAUSE OF ACTION" and insert in lieu thereof the caption "SECOND CAUSE OF ACTION."

On page 2 thereof, strike out caption "SECOND CAUSE OF ACTION" and insert in lieu thereof the caption "FIRST CAUSE OF ACTION."

J. C. CAMPBELL and

D. L. LEVY,

Attorneys for Plaintiff.

[Endorsed]: Filed Jun. 5, 1914. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [66]

*In the District Court of the United States in and for  
the Northern District of California, Division  
Two.*

No. 15,366.

WESTINGHOUSE ELECTRIC AND MANUFACTURING COMPANY, a Corporation,  
Plaintiff,

vs.

SAMSON IRON WORKS, a Corporation,  
Defendant.

**Notice of Demand for Bill of Items.**

To Samson Iron Works a Corporation, Defendant  
and Cross-complainant Herein, and to Messrs.  
Frank & Frank, Attorneys for said Defendant  
and Cross-complainant:

Please take notice that plaintiff and cross-defendant herein demands a bill of particular items of the account mentioned in defendant's cross-complaint on file herein.

Dated April 23, 1914.

J. C. CAMPBELL and  
DAVID L. LEVY,

Attys. for Plaintiff and Cross-defendant.

Received duplicate of the within this 14th day of  
May, 1914.

NATHAN H. FRANK,  
IRVING H. FRANK,  
Attys. for Defendant.

[Endorsed]: Filed May 15, 1914. W. B. Maling,  
Clerk. By C. W. Calbreath, Deputy Clerk. [67]

*In the District Court of the United States in and for  
the Northern District of California.*

No. 15,366.

WESTINGHOUSE ELECTRIC AND MANUFACTURING COMPANY, a Corporation,

Plaintiff,

vs.

SAMSON IRON WORKS, a Corporation,

Defendant.

BILL OF PARTICULARS FURNISHED BY THE  
SAMSON IRON WORKS, IN COMPLIANCE  
WITH THE DEMAND OF THE WESTINGHOUSE  
ELECTRIC AND MANUFACTURING COMPANY,  
OF THE ITEMS OF THE ACCOUNT MENTIONED  
IN THE DEFENDANT'S CROSS-COMPLAINT ON  
FILE HEREIN:

To freight on engine and parts shipped June 23d.....	\$58.23	
To freight on engine shipped Aug. 1st.. .. .	72.40	
Freight on return of machinery from Portland to Stockton .....	95.35	
Crating and cartage of engine at Stockton....	60.00	\$258.98
<hr/>		
To 70 days' labor of C. E. Mitchell dating from June 23d to Sept. 19, 1910, at \$4.00 per day.....	280.00	



His living expenses, common labor  
and material purchased by C.  
E. Mitchell during the above  
period. . . . . 727.15

---

Total. . . . . 1007.15

Industrial Engineering Co.:

To services rendered, paid on  
Feb. 7, 1911. . . . . 500.00

To 19 days' service of S. H. Head  
at \$8 per day. . . . . 152.00

To expenses incurred by our Mr.  
S. H. Head while in San Fran-  
cisco. . . . . \$63.45

Ditto in Portland. . . . . 242.00

---

Total. . . . . 457.45

Carried forward. . . . . \$2,375.58

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Brought forward. . . . . \$2,375.58

To 3 days' services of J. M.  
Goodin at \$7.00 per day. . . . . \$21.00

Expenses incurred. . . . . 7.30

---

Total. . . . . 28.30

Hottenworth & Maskell, Portland:

To pipe, pipe fittings and labor. . . . . 662.59

Chas. F. Pedersen:

For services rendered in hand-  
ling machinery into Spalding  
Bldg. in July. . . . . \$60.00

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To services ditto in Aug., sec-  
ond engine..... 78.50

---

Total..... 138.50

Safety Stove-pipe & Steel Metal Co.:

To making pan and tank July  
20th..... 7.00

Putting flange on pipe Aug. 6th. 8.00

Making pan and tank Aug. 17th. 7.00

---

Total..... 22.00

Western Union Telegraph Co.:

To messages sent to Portland  
pertaining to machinery in  
Spalding Bldg..... 13.12

Telegrams and stenographer's  
services from Mr. J. M.  
Kroyer, San Francisco, to S.  
H. Head, Portland, up to Sept.  
13, 1910..... 21.80

Nicolai-Neppach Co.:

To timbers purchased..... \$2.50

Wire and timbers purchased.. 2.15

---

Total..... 4.65

Helzer Unden Machine Works:

To machine work and materials  
furnished by this company as  
per their invoice total..... 149.75

Pacific Electric Engineering Co.:

To rent on ammeter..... .50

*vs. Samson Iron Works.* 101

B. C. Ball, M. E., to services rendered as engineer.....	50.00
Crown Columbia Pulp & Paper Co.: To use of teams, drivers and common labor.....	15.25
Hagemann & Foard Co.: To rope purchased.....	2.80
Muirhead & Murhard Co.: To pipe purchased and expressage on same.....	3.10
Preer Cutlery & Tool Co.: Scale.....	.90
Helser Bros. Transfer Co.: To hauling machinery from Spalding Bldg. to steamer landing....	60.00
Olsen-Roe Transfer Co.: To hauling parts of machinery from steamer landing to Spalding Bldg.....	17.00
Carried forward.....	\$3,565.84
[69]	
Brought forward.....	\$3,565.84
Wiliamette Iron Works: To work making Prony brake..	47.50
Cartage on return of engine at Stockton.....	40.00
	<hr/>
	\$3,653.34

Loss of profit on the contract with

Z. S. Spalding to furnish him

with gas engines and generators.

\$4,040.00

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\$7,693.34

NATHAN H. FRANK,  
IRVING H. FRANK,  
Attorneys for Defendant.

[Endorsed]: Filed Oct. 8, 1915. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [70]

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*In the District Court of the United States, in and for  
the Northern Division of California, Second  
Division.*

No. 15,366.

WESTINGHOUSE ELECTRIC AND MANUFAC-  
TURING COMPANY, a Corporation,  
Plaintiff,

vs.

SAMSON IRON WORKS, a Corporation,  
Defendant.

**Verdict.**

We, the jury, find in favor of the defendant.

GEO. U. HIND,  
Foreman.

[Endorsed]: Filed June 18, 1914. Walter B. Mal-  
ing, Clerk. [71]

At a stated term, to wit, the March term, A. D. 1914, of the District Court of the United States of America, in and for the Northern District of California, Second Division, held at the courtroom in the City and County of San Francisco, on Thursday, the 18th day of June, in the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

**[Order Directing That Verdict be Recorded, etc.]**

No. 15,366.

WESTINGHOUSE ELECTRIC & MANUFACTURING CO.,

vs.

SAMSON IRON WORKS.

The parties hereto and the jury being present the trial hereof was resumed by the further arguments of counsel, at the conclusion of which the Court having instructed the jury, they retired at 11:55 A. M. to deliberate upon their verdict. At 2.40 o'clock P. M. the jury returned into court and being asked if they had agreed upon their verdict answered in the affirmative and returned the following verdict which was ordered recorded, namely: "We, the jury, find in favor of the defendant. Geo. U. Hind, Foreman." Mr. Frank moved the Court to enter judgment in favor of defendant in the sum of \$7,693.34, which motion was denied. Ordered that judgment be entered in accordance with said verdict and for costs and that the jury be discharged from further consideration hereof. Upon motion of plaintiff it



was ordered that this cause be continued for the term for further proceedings. [72]

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*In the District Court of the United States, in and for  
the Northern District of California, Division  
Two.*

No. 15,366.

WESTINGHOUSE ELECTRIC & MANUFACTURING COMPANY, a Corporation,  
Plaintiff,

vs.

SAMSON IRON WORKS, a Corporation,  
Defendant.

**Petition for Writ of Error.**

Westinghouse Electric & Manufacturing Company, a corporation, plaintiff in the above-entitled action, feeling itself aggrieved by the verdict of the jury and the judgment and decision of the above-entitled court, in favor of the defendant and against plaintiff, made and entered therein on the 18th day of June, 1914, comes now, by J. C. Campbell and David L. Levy and J. C. Campbell, Weaver, Shelton & Levy, its attorneys, and petitions said Court for an order allowing it to prosecute a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit to review said verdict, decision and judgment according to the statute of the United States of America in that behalf made and provided, and for an order fixing the amount of security which plaintiff shall give as supersedeas and for costs on said writ of error, and providing that

upon the giving of such security all further proceedings in this court be suspended and stayed until the determination of said writ of error in said United States Circuit Court of Appeals.

And your petitioner will ever pray.

Dated this 9th day of December, 1914.

WESTINGHOUSE ELECTRIC & MANUFACTURING CO.,

Plaintiff.

J. C. CAMPBELL and

DAVID L. LEVY,

J. C. CAMPBELL, WEAVER, SHELTON & LEVY,

Attorneys for Plaintiff.

[Endorsed]: Filed Dec. 9, 1914. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [73]

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*In the District Court of the United States, in and for the Northern District of California, Division Two.*

No. 15,366.

WESTINGHOUSE ELECTRIC & MANUFACTURING COMPANY, a Corporation,  
Plaintiff,

vs.

SAMSON IRON WORKS, a Corporation,  
Defendant.

**Assignment of Errors and Prayer for Reversal.**

Plaintiff herein, by J. C. Campbell and David L. Levy and J. C. Campbell, Weaver, Shelton & Levy, its attorneys, hereby assigns the following errors of

said Court upon which plaintiff will rely, in case its petition for writ of error is granted, upon the prosecution of said writ of error in the United States Circuit Court of Appeals for the Ninth Circuit:

1. The said District Court erred in overruling the objection of plaintiff to the question asked by defendant of witness J. M. Kroyer, to wit: "Q. What number of BTU's of gas is necessary to develop the 100 horse-power in a 100 horse-power gas engine," to which ruling plaintiff excepted, and the question was answered as follows: "A. Not less than 650 BTU's would develop in that engine the 100 horse-power. Ordinary illuminating gas is said to contain from 675 to 810, but to be conservative we based our calculations upon it at 650."

2. Said Court erred in admitting in evidence the testimony of W. M. Perry and E. L. Hall, whose depositions, taken in Portland, were read in behalf of defendant.

3. Said Court erred in overruling plaintiff's objection to [74] defendant's question to said witness, to wit: "Q. Can you state how long it would take in 1910 to freight an apparatus such as a generator from Pittsburgh to Portland," to which ruling plaintiff excepted, and to which question the witness answered: "A. We figured at that time that twenty-one days for freight to go from say East Pittsburgh or Philadelphia."

4. Said Court erred in overruling plaintiff's objection to defendant's question to the witness Kroyer as follows: "Q. Now, referring to that, Mr. Kroyer, state what the detail is of the damages and losses by

reason, as we claim, of the failure of these parties to carry out their contract," to which ruling the plaintiff excepted, and in response to which question the items of defendant's alleged damage were admitted in evidence. The same specification is made to the following question: "Q. What was the amount of profit on the contract of the Spaulding Company," to which it was answered: "A. Our lost profit we figured to be \$4,040.00." The same specification is made in regard to the question: "Q. How did you figure that," and the answer thereto.

5. Said Court erred in overruling plaintiff's objection to defendant's question to witness S. H. Head, to wit: "Q. What passed between you and him (referring to Colonel Spaulding)," to which ruling the plaintiff excepted and in response to which question witness stated the conversation between himself and Colonel Spaulding.

6. Said Court erred in instructing the jury as follows: "On the other hand, should you find that the foundation and other construction for the installation called for by the contract were in readiness in time to enable plaintiff to install with reasonable diligence and put in operation its generator within due time under the contract, but that the failure to have such installation [75] completed and in operation within such time arose from plaintiff's failure or neglect to deliver or erect the same complete, or was because of the defective or insufficient character of the machine, then defendant was entitled to reject it and repudiate the contract and the plaintiff cannot recover, but would itself be



guilty of a breach of the contract," to which instruction plaintiff excepted.

7. Said Court erred in instructing the jury as follows: "In this connection it is claimed by the defendant that proper bed-plates upon which to install such generators as are here involved are an essential feature of the installation to be furnished by the builder of the generator apparatus; the plaintiff, on the other hand, claiming that proper construction and engineering methods as understood in that business require such bed-plates to be furnished by the party installing the engine feature of the unit. The contract in this instance is silent upon this subject, but evidence has been introduced tending to show the custom prevalent in that respect. In this regard, if you find that it was the duty of plaintiff to furnish a proper bed-plate for the first generator, and that the failure to have that structure installed and in successful operation within the required time was in whole or in part by reason of plaintiff's neglect to furnish such bed-plate, then plaintiff was in default in the performance of its contract and defendant was justified in refusing to go on with it, and the plaintiff cannot recover," to which instruction plaintiff excepted.

8. Said Court erred in instructing the jury as follows: "Again, in connection with the defense, it is provided in the contract that delivery of the other two generators specified will be made from the factory in approximately ninety days from date of receipt of orders therefor. This word 'approximately' means within a reasonable limit of a few days; that



is, its effect is to give a [76] reasonable extension of time for performance beyond the ninety days, limit, to be established and determined under all the circumstances. The defendant claims that an order to deliver these generators was sent to the plaintiff on or prior to May 31st, 1910. If you find such to be the fact, those generators should have been delivered on or about August 31st following. There is evidence tending to show that on September 12th the defendant notified the plaintiff company that they would have no further use for those two generators, and that the one already delivered awaited removal by the plaintiff. Up to that time there had been no delivery of the two generators referred to, and if you find that this delay was an unreasonable one, as not warranted by the time specified in the contract, then plaintiff was in default in that respect and the defendant was justified in refusing to receive that part of the apparatus," to which instruction plaintiff excepted.

9. Said Court erred in refusing to give to the jury the following instruction proposed by plaintiff:

"It is in evidence that this order was mailed from the Portland office after having been taken to Portland from San Francisco. It was signed by defendant's manager on May 26th; it was sent from Portland May 31 by mail. Therefore it could not have been received at the factory any earlier than June 4th.

On August 3, 1910, plaintiff sent an invoice to defendant in the amount of \$1,500. Defendant did not pay the same but wrote offering an excuse for its

failure. Plaintiff wrote again to defendant on August 8th, 1910, requesting payment; still defendant did not comply. Another request was made on August 24th.

On August 25, 1910, defendant wrote a letter to plaintiff, received presumably on the following day, in which defendant stated as follows: 'We beg to notify you that we have not and will [77] not under any circumstances accept your generator nor any part of your machinery until you have conclusively proven to us that you have done the work specified in your contract with us which is that you are to supply a generator together with all necessary electrical equipment to deliver 75 Kw's in one instance and 100 Kw's in another instance to a switch-board when direct connected to our engine, and we further notify you that inasmuch as you have violated your contract with us that same is void and of no effect.'

On August 25, 1910, the first unit was operated and the required electrical power could not be developed. At a later test made of the gas engine of the defendant it delivered only a maximum of 78.5 H. P., while there is evidence that to develop 75 Kw. in a generator such as required by this contract, a machine developing between 100 and 125 H. P. would be necessary. Between the 25th of August and and the 2d day of September, 1910, the defendant was ordered by the owner of the Spaulding Building to take its apparatus out of the building," to which refusal plaintiff excepted.

10. Said Court erred in instructing the jury as

follows: "On the question of damages, should you find for the plaintiff you will understand that under the contract between the parties there was no sale of any part of the machinery therein referred to actually consummated. By the express provisions of the contract no property in or title to the apparatus or any part thereof and no right to use the same under the patents of the plaintiff, passed to the defendant, but all of said apparatus remained the personal property of the plaintiff until fully paid for. The contract in that regard provides that if default be made by the purchaser in payments stipulated for at the time specified in the contract, the seller shall be entitled to the immediate possession of said apparatus and be free to enter upon the premises where the [78] same is located and to remove it as its property. If, therefore, you find for the plaintiff, it will not be entitled to recover for the value of the apparatus installed by plaintiff or any part thereof, since it remains its property, and there is no evidence that it has been lost or injured, but it will only be entitled to recover such damages as it has sustained in its endeavor to carry out the contract, such as the expense of the delivery and installation thereof, and the necessary steps to have it returned to it, together with such profit as it would have realized on its sale had the contract been fully executed.

Further, in this connection, it is in evidence that the two generators that were not shipped were subsequently sold by plaintiff. As to those machines, therefore, if you find that they were sold for as much as

plaintiff would have realized for them under the contract, the plaintiff can be allowed nothing for the failure of defendant to accept them.

It also appears that after the contract had been abandoned the plaintiff dismantled the switchboard called for by its terms and distributed its available parts back to its stock. Therefore should your verdict be for the plaintiff it will be entitled, as to this appliance, only to the difference between the value to plaintiff of its parts and the value of the switchboard as a complete article, together with any profit over its cost which would have been realized had the contract been carried out. But you will bear in mind that the different pieces of machinery called for by the contract were not being sold piece-meal. The contract fixes a gross sum as to consideration to be paid for all the apparatus to be furnished by plaintiff thereunder, and therefore, should you find for plaintiff, it will be entitled to a verdict only for the difference between that gross sum and the value to it of the property [79] left on its hands, to be arrived at in the way I have indicated, to which should be added the expense it would have been to in installing the apparatus not delivered had the contract been carried out, which expense the contract provides is to be borne by the plaintiff," to which instruction plaintiff excepted.

11. Said Court erred in refusing to give to the jury the following instruction proposed by plaintiff:

"The contract contains a provision that all previous communications between the parties, either verbal or written, with reference to the subject mat-



ters of the contract or abrogated by the contract, and that the proposal, duly accepted and approved, constitutes the agreement between the parties. You are therefore instructed to disregard all such previous communications and assertions therein with reference thereto," to which refusal plaintiff excepted.

12. Said Court erred in refusing to give to the jury the following instruction proposed by plaintiff:

"If for the reasons I have outlined as the basis therefor you shall conclude that the plaintiff is entitled to your verdict, the measure of damages is as follows:

The contract price for the entire installation is \$7,850. From this you shall subtract the sum of the following items:

1. The market value at Portland, Oregon, in September, 1910, of the second and third generators, if you find that they had such market value;

2. If you find that the permanent switchboard had no market value as such but only as comprising articles which when dismantled could be replaced in stock, the value of the component parts of the switchboard at said time;

3. The freight charge at said time upon the switchboard from [80] East Pittsburgh, Pennsylvania, to Portland, Oregon, had it been shipped; and

4. The cost at that time of labor and material necessary to erect and install said second and third generators, permanent switchboard and other apparatus.

The balance is the amount of damages suffered



by the plaintiff. Whether or not plaintiff received more than the cost of building the second and third generators at a sale to another party is utterly immaterial.

If, therefore, as stated, your verdict shall be for the plaintiff and you shall find that the market value at Portland, Oregon, in September, 1910, of the second and third generators was \$2,827.10; that the permanent switchboard had no market value but only a value as comprising articles which when dismantled could be replaced in stock and that the value of the component parts of the switchboard at that time was \$1,267.83; that the freight at said time upon said switchboard, had it been shipped from East Pittsburgh, Pennsylvania, to Portland, Oregon, would have been \$100.80; and that the cost at that time of labor and material necessary to erect said second and third generators and permanent switchboard was \$400.00; then the amount of your verdict for the plaintiff shall be \$3,254.27," to which refusal plaintiff excepted.

13. Said Court erred in refusing to give to the jury the following instruction proposed by plaintiff:

"The contract provides that the title to the property to be delivered and installed thereunder should remain in the plaintiff until all the payments provided for in the contract were made. But so far as this case is concerned, the insertion of this provision in the contract gave the defendant no more or greater [81] rights than if it has been omitted and should, therefore, be wholly disregarded by you in rendering your verdict," to which refusal plaintiff excepted.

14. The evidence was insufficient to justify the verdict of the jury, decision and judgment in favor of defendant in the following particulars.

a. The evidence established without conflict that the plaintiff furnished the first generator and temporary switchboard provided for in the contract in suit at the time and of the capacity and quality called for by the contract and as soon as the foundation and other construction required were in a condition of readiness, erected and installed said apparatus and put the same in operation, and further, that within approximately ninety days from the date of receipt of defendant's order plaintiff was ready, able and willing to deliver from its factory the two other generators and apparatus called for by the contract, including the permanent switchboard, but that before the time specified for such delivery defendant distinctly and absolutely refused to perform the contract so that defendant's action amounted to a prevention or performance by plaintiff and that plaintiff was therefore at liberty to consider the contract as broken by the defendant and at an end and to desist from further effort on its part to perform the same;

b. That the evidence shows without conflict that by reason of defendant's breach of the contract in suit plaintiff suffered damages measured as follows:

Subtracting from the contract

price for the entire installa-

tion, to wit .....

\$7,850.00

the sum of the following items:

The market value at Portland, Ore-  
gon, in September, 1910, of the  
second and third generators, to  
wit. . . . . \$2,827.10

[82]

The value of the component parts  
of the permanent switchboard,  
to wit . . . . . 1,267.83

Freight upon said switchboard had  
it been shipped . . . . . 100.80

Cost of labor and material neces-  
sary to erect the second and  
third generators and the  
switchboard, to wit . . . . . 400.00

c. The evidence shows without conflict that the plaintiff proceeded to perform the contract in suit in every particular, that the first and only breach thereof was committed by the defendant.

WHEREFORE plaintiff prays that the judgment of said District Court be reversed and that a new trial of said cause be ordered.

WESTINGHOUSE ELECTRIC & MANU-  
FACTURING CO.,

Plaintiff.

J. C. CAMPBELL and  
DAVID L. LEVY,

J. C. CAMPBELL, WEAVER SHELTON &  
LEVY,

Attorneys for Plaintiff.

[Endorsed]: Filed Dec. 9, 1914. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [83]

*In the District Court of the United States, in and for  
the Northern District of California.*

No. 15,366.

WESTINGHOUSE ELECTRIC & MANUFACTURING COMPANY, a Corporation,  
Plaintiff,

vs.

SAMSON IRON WORKS, a Corporation,  
Defendant.

**Order Allowing Writ of Error and Supersedeas.**

Upon motion of plaintiff and upon filing the petition for a writ of error and assignment of errors herein, it is

ORDERED, that a writ of error be, and the same is, hereby allowed to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit the verdict, decision and judgment heretofore rendered herein and other matters and things in said assignment of errors set forth, and that upon the filing herein of a bond in the sum of Three Hundred Dollars (\$300.00), which shall constitute a supersedeas bond and a bond for costs and damages on appeal, all further proceedings in this court shall be stayed until the determination of said writ of error.

Dated December 9th, 1914.

WM. C. VAN FLEET,  
Judge.

[Endorsed]: Filed Dec. 9, 1914. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [84]



**[Bond on Writ of Error.]**

KNOW ALL MEN BY THESE PRESENTS, That we, Westinghouse Electric & Manufacturing Co., a Corporation, as principal, and A. M. IRWIN and R. F. BEHAN, as sureties, are held and firmly bound unto Samson Iron Works, a corporation, in the full and just sum of (\$300.00) Three Hundred Dollars, to be paid to the said Samson Iron Works, a corporation, or its certain attorney, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this — day of December in the year of our Lord one thousand nine hundred and fourteen.

WHEREAS lately at a District Court of the United States for the Northern District of California in a suit depending in said Court, between Westinghouse Electric & Manufacturing Company, a Corporation, and Samson Iron Works, a Corporation, a judgment was rendered against the said Westinghouse Electric & Manufacturing Company, a Corporation, and the said Westinghouse Electric & Manufacturing Company, a Corporation, having obtained from said Court a writ of error to reverse the judgment in the aforesaid suit, and a citation directed to the said Samson Iron Works, a corporation, citing and admonishing it to be and appear at a United States Circuit Court of Appeals for the Ninth



Circuit, to be holden at San Francisco, in the State of California.

Now, the condition of the above obligation is such, that if the said Westinghouse Electric & Manufacturing Company, a Corporation, shall prosecute said writ of error to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

A. M. IRWIN. (Seal)

R. F. BEHAN. (Seal)

Acknowledged before me the day and year first above written.

[85]

United States of America,  
Northern District of California,—ss.

A. M. Irwin and R. F. Behan, being duly sworn, each for himself, deposes and says, that he is a freeholder in said District, and is worth the sum of Three (300.00) Dollars, exclusive of property exempt from execution, and over and above all debts and liabilities.

A. M. IRWIN.

R. F. BEHAN.

Subscribed and sworn to before me, this 9th day of December, A. D. 1914.

[Seal]

E. W. LEVY,

Notary Public in and for the City and County of San Francisco, State of California.

Form of bond and sufficiency of sureties approved.

WM. C. VAN FLEET,

Judge.

[Endorsed]: Filed December 9, 1914. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.  
[86]

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*In the District Court of the United States, in and for  
the Northern District of California, Division  
Two.*

No. 15,366.

WESTINGHOUSE ELECTRIC & MANUFACTURING COMPANY, a Corporation,  
Plaintiff,

vs.

SAMSON IRON WORKS, a Corporation,  
Defendant.

**Order [Allowing Plaintiff to February 7, 1915, to  
Make Return on Citation].**

Good cause appearing therefor, it is hereby

ORDERED: That plaintiff may have to and including the 7th day of February, 1915, within which to make return on the citation on writ of error heretofore issued in the above-entitled matter.

Dated this 8th day of January 1915.

WM. C. VAN FLEET,  
Judge. [87]

*In the District Court of the United States, in and for  
the Northern District of California, Division  
Two.*

No. 15,366.

WESTINGHOUSE ELECTRIC & MANUFACTURING COMPANY, a Corporation,  
Plaintiff,

vs.

SAMSON IRON WORKS, a Corporation,  
Defendant.

**Order Extending Time to [January 29, 1915, to]  
Make Return on Citation.]**

Good cause appearing therefore, it is hereby.

ORDERED: That plaintiff may have to and including the 29 day of January, 1915, within which to make return on the citation on writ of error heretofore issued in the above-entitled matter.

Dated this 23 day of January, 1915.

M. T. DOOLING,  
Judge.

[Endorsed]: Filed Jan. 23, 1915. W. B. Maling,  
Clerk. By C. W. Calbreath, Deputy Clerk. [88]

*In the District Court of the United States, in and for  
the Northern District of California, Division  
Two.*

No. 15,366.

WESTINGHOUSE ELECTRIC & MANUFACTURING COMPANY, a Corporation,  
Plaintiff,

vs.

SAMSON IRON WORKS,

Defendant.

**Stipulation Extending Time to Make Return on  
Citation.**

It is hereby stipulated by and between the parties hereto that plaintiff may have twenty (20) days from and after the settlement of the bill of exceptions herein within which to make a return on the citation, heretofore issued, on writ of error, to docket said cause and file the record therein, provided the Return day as extended by order of Court has not at this date expired.

NATHAN H. FRANK,  
IRVING H. FRANK,  
Attorneys for Defendant.  
J. C. CAMPBELL and  
DAVID L. LEVY,  
Attorneys for Plaintiff.

Dated this 28th day of January, 1915.

So ordered:

WM. C. VAN FLEET,  
Judge.

[Endorsed]: Filed Jan. 30, 1915. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [89]

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*In the District Court of the United States, in and for  
the Northern District of California, Second  
Division.*

No. 15,366.

WESTINGHOUSE ELECTRIC & MANUFACTURING COMPANY, a Corporation,  
Plaintiff,

vs.

SAMSON IRON WORKS, a Corporation,  
Defendant.

**Bill of Exceptions.**

BE IT REMEMBERED that the above-entitled action came on for trial before the Court, Honorable WILLIAM C. VAN FLEET, District Judge, presiding, plaintiff being represented by J. C. Campbell, Walter Shelton and David L. Levy, and defendant being represented by Nathan H. Frank and Irving H. Frank.

A jury was duly impanelled and sworn to try the case, and the following proceedings were then had.

The contract between the parties to this action, in words and figures as set forth in the answer to the amended complaint herein, was offered and admitted in evidence. Attached thereto and offered and admitted in connection therewith, was the following letter:



**Exhibit [Letter, June 4, 1910, Samson Iron Works  
to Westinghouse Electric & Mfg. Co.].**

Stockton, Cal., June 4, 1910.

Westinghouse Electric & Mfg. Co.,

San Francisco, Cal.,

Attention of A. M. Irwin.

Gentlemen: [90]

This is to inform you that Mr. S. H. Head, our  
salesmanager, is authorized to sign the electrical con-  
tract with you on account of the Spaulding Building.

**SAMPSON IRON WORKS.**

**J. M. CROYER,**  
President.

Stamped:

Treasury Dept.

S. F.

Jun. 6, 1910.

Westinghouse Elec.

& Mfg. Co. [91]

**[Testimony of N. P. Wilson, for Plaintiff.]**

N. P. WILSON, sworn on behalf of plaintiff, testi-  
fied as follows:

Direct Examination by Mr. LEVY.

I am forty years of age. My business is electrical  
engineer. I received my education and instruction  
in engineering at Stanford University. I was in the  
factory of the plaintiff, in the winding department,  
two years, and two years in the testing department.  
Then I went with the sales department.

In the year 1910 I was erecting engineer for the

(Testimony of N. P. Wilson.)

Seattle district, which includes the States of Oregon, Washington and Alaska.

From my experience at the works of the Westinghouse Electric & Manufacturing Company I know this concerning the method of numbering generators that are their manufacture. Every generator that is built receives a serial number, most generators receive two serial numbers, one on the stationary part and one on the rotary part. There is no other generator or machine that is manufactured by the Westinghouse Company with same number. The identification is made entirely by these serial numbers.

In the year 1910 I met the representative of the defendant at the Spalding Building in Portland, or was at least told that he was their representative. I was the erecting engineer in that building in charge of the construction, erection and installation of a generator for the Westinghouse Electric & Manufacturing Company, and the first trip I made on the actual construction of this machine was July 9th, working from that time up until the 17th. The first work that I did was to install a temporary switch board which we had furnished for that purpose, and to draw in iron conduits—the cables from the generator to the switchboard. As I said Mr. Mitchell was a representative of the Samson Iron Works and was at that time working towards [92] the installation of his gas engine, was having the shaft made in the city here for installation in our generator. The gas engine was lying in the basement just setting in the basement not on its foundations. Mr. Mitchell was

(Testimony of N. P. Wilson.)

in charge of that gas engine. As to the condition of the basement of the Spalding Building at that time, as I remember it, the basement was entirely unfurnished at that time. In any event, the concrete floors were not set in.

Preparation was necessary in order to pull these cables in. The conduit had to be placed, or at least the form work for the foundations had to be put in place before we could do any work towards the coupling of the conduit, because the conduit had to be taken through the concrete foundations themselves. There was nothing but the form built at that time. The building company, I believe, provided the foundations, and they put in these forms, while we were working on our switchboard and cables, which allowed us afterwards to install our conduit in the forms, which could afterwards be grouted right in concrete.

The shaft to which I referred a few minutes ago is a steel shaft which has to be turned up to proper size for placing in the rotating element of our generator. The rotating element of the generator is called the armature. The shaft is connected directly—the gas engine shaft—by a steel coupling. The shaft that was to be used for this purpose at this time was unfinished. On July 17th, before I left the job, I inquired of Mr. Mitchell, as to when the building would be in readiness for installation, when he thought we would be able to go ahead and install our generator, as I did not wish to stay in the city any longer than necessary, and he said he didn't know, had no idea

(Testimony of N. P. Wilson.)

when the shaft would be ready. He didn't say anything about the foundations. He had nothing to do with the foundations as I understood. [93]

The Spaulding Building Company was erecting the foundations there, as I understand it. It was not possible to install the generator at this time, because the shaft which the engine company was furnishing for our machine was not at the ground at the time. That made it impossible for us to erect our machine because our machine being the stationary part divided in the middle. It was necessary to mount the armature before the fields could be erected, and in order to mount the armature it was necessary to have the shaft to mount the armature on, and this was being provided by the Samson Iron Works and was not on the ground at the time. We could not install the engine of the generator without there being foundations to accommodate, but these foundations were not in at that time. The foundations had everything to do with our inability to erect the engine and the generator.

I next went on this job in the Spaulding Building on the 26th of July. I found Mr. Mitchell there. He was working with his gas engine to get it ready for installing on the foundation, and also having this shaft—I don't know whether the shafting was complete just at this time or not, but he was working on his engine, at least, getting it ready for installation. The foundation was in at this time. We erected our machine on the wooden base-plate on a heavy wooden base-plate for this purpose, which



(Testimony of N. P. Wilson.)

was to be a temporary proposition. This wooden base-plate was merely a base made out of heavy wood, on which the generator would rest to level it up on the concrete, that was the prime object of a sole-plate to first provide a bed for the generator on the concrete, and the method of bolting the generator down. The generator was not operated at this time because the Samson Iron Works had not connected up their gas piping to their engine. Of course, it was impossible to run the engine because we couldn't get gas to run it.

I remained on the job at this time until the first of August. I asked Mr. Mitchell when he thought the gas piping would be put in ready to run, and he said he didn't know. [94]

I was next on the job on the 15th of August. At that time the engine was ready to run and we made a sort of test on the machine, that is, we put the set up to full speed, brought up the generator to full voltage and found that there was a vibration to the set, which made it unsafe to operate under a load at this time. I didn't want to put any load on it. This vibration was caused by the engine shaft not being true, because of the armature running eccentric. We put up what we called a pin guage, merely fastened a pin up near the shaft rigidly, and turning the machine over two different positions to measure distance between this stationary pin and the shaft. We found that the shaft was not running true, and that brought the pin closer to the shaft, it rotated closer to the pin at one point than the other.



(Testimony of N. P. Wilson.)

It disclosed that the coupling which joined the engine shaft to the generator shaft was not turning true. We assisted Mr. Mitchell, to remove this armature with this shaft to the machine-shop, and the proprietor, I believe, of the machine-shop tested out the shaft and found that it was out of true. And the shaft was left with the machine-shop to be trued up.

Mr. Wernicke, sales representative of the Westinghouse, and I decided as long as it would be some little time to straighten up the shaft proposition that we would have a cast-iron sole-plate made here in Portland and placed under the machine at this time, so that the machine would be in a permanent condition to save any further work in this respect afterwards.

I left on the 17th of August. I was next on the job on the 25th. A new sole-plate, cast-iron sole-plate, had been installed, and the generator completely erected again, and everything as I expected was ready to operate. I installed at this time balance coils for this generator, in order that they could [95] take the voltage from the machine for furnishing lights for the building. Mr. Mitchell, Mr. Heber and myself run a test on the engine and generator to see what work we could get out of the unit. The generator was loaded up by means of a water rheostat, and while Mr. Mitchell operated the gas engine, Mr. Heber and myself operated the water rheostat, and read the switchboard instruments, which indicated the amount of load which

(Testimony of N. P. Wilson.)

the generator was delivering. The maximum load which we were able to pull on the set was *fifty* kw. output on the switchboard. The operation of the machine was—the commutation was first-class. We found that when we reached a point of fifty kw. output that it was impossible to get any higher with the load on account of the engine dropping in speed. That denoted that the engine was overloaded, it was up to its overload capacity. We could not get any higher than fifty kw. The engine laid down. Mr. Mitchell said he had about a pint of gasoline, and if anything would pull the rating of the engine, gasoline would. He used this small amount of gasoline in the engine and run it on this gasoline while I took the load, and we found it would not pull any more than it did with the gas.

Q. Was the engine permitted to die down and did he then put gasoline and run the engine on gasoline in making this gasoline test?

A. I don't remember how he applied the gasoline, but he simply told me to work the water rheostat and watch the meters while he ran the engine on the gasoline. I didn't see how he used the gasoline on the engine.

I saw him take this amount of gasoline and go over to his engine and he got all ready to use it, as he said, and he said for me to watch the load, while he applied the gasoline to the engine. I saw him go to the engine with that amount of gasoline.

Q. What was the condition of the can after the test took place?      A. I could not say.

(Testimony of N. P. Wilson.)

Q. Do you know whether there was any gasoline in it after the test was made?

A. I didn't examine the can myself.

In my opinion this test showed that the fact that the engine did not pull up to its rate of output, was not due to poor gas, but [96] to the fact that the gas engine was not large enough to carry the load for which it was intended.

The serial number of this generator was 461,762.

I made an examination, inspection and test of this generator at this time. The machine was in first-class condition. Commutation as to the load which we ran it at was perfect. If the load had been increased the commutation and condition of the machine and its operation would have been the same. If there had been any defect in that generator at that time it would have been evident and apparent. The condition of the generator was good in every respect when I examined it. There was no evidence whatever of the machine having been run before or having had abuse of any kind at all. A temporary switchboard was installed on the Samson Iron Works job. It was furnished simply for two hundred fifty volts for power.

When a machine of a certain output or a certain class is first built it is built along certain specifications, which call for the size of the wire and the size of the castings all through in fact, covers the complete manufacturing data with respect to this machine, and when the first machine on this specification is built, it gets a complete set of tests from the factory be-

(Testimony of N. P. Wilson.)

fore it leaves, and after this first test is run, any succeeding machines that are building on the same specification do not receive the complete set of tests, but only such tests as are necessary for commercial work. The subsequent machines will be guaranteed for the same efficiency and other characteristics as the original machine on this specification.

Recross-examination by Mr. FRANK.

The conduits for the other two machines were put in at the same time as the conduits for the first machine were laid.

It is a part of our plan to lay this conduit before the foundation is laid. I am not sure who it was up to to run this conduit. It was my estimation, however, that the Spalding Co. building was to lay this conduit.

But you don't know anything about it?

A. I am not up on that point.

I do not know how long it took to true the shaft up in the machine-shop.

Q. Are not some of those generators built with a sole-plate in one piece? A. Yes, sir.

Q. In other words, the sole-plate is an integral part of the generator? [97] A. No, sir.

Q. Why is it not?

A. You mean a part of a generator frame itself?

Q. Well, it is built on the generator frame.

A. It is built separate.

Q. Built separate?

A. It is always built separate.

Q. You mean to say that no generator is built in



(Testimony of N. P. Wilson.)

which the sole-plate and the frame is one?

A. I never have seen any. [98]

The following correspondence was then offered in evidence by plaintiff, the defendant admitting that the letters were sent upon the date that they bear and received in due course of mail:

**Exhibit [Letter, August 3, 1910, A. M. Irwin to  
Samson Iron Works].**

8—3—10.

Samson Iron Works,  
Stockton, Cal.

Gentlemen:

Enclosed herewith please find our invoice of Aug. 1st., 1910, #8137, in the amount of \$1500.00, covering partial shipment on contract of May 25th, 1910. Payment in full became due, according to our terms, on July 15th, 1910. A prompt remittance in line with such terms will be very much appreciated.

Very truly yours,

A. M. IRWIN,  
Asst. to Treasurer.

**Exhibit [Letter, August 4, 1910, Samson Iron Works  
to Westinghouse E. & Mfg. Co.].**

Stockton, Cal., Aug. 4, 1910.

Westinghouse Electric and Mfg. Co.,  
#165 Second St.,  
San Francisco, Cal.

Gentlemen: Attention Mr. Irwin.

Your invoice August 1st, 1910, #8137, in the amount \$1,500.00, covering partial shipment of contract of May 25th, 1910, payment in full becoming



due according to the terms of contract on July 15th or immediately upon installation and acceptance, is receiving our attention.

This contract which while assumed in its entirety by Samson Iron Works is in *reality* a joint contract between your good selves and this Company and at the time we entered into the agreement with you for your end of the work, the writer of this letter having had a good deal of experience in the uncertainties of finishing a job on time, had it expressly understood with your Messrs. Bean & Wernicke that we were to pay you immediately we received payment from Colonel Spalding but as they felt that your Company would desire a more definite date of payment, it was decided between us that the work should be accomplished without doubt by July 15th, hence this date of payment was inserted. Three or four days ago we received a letter from our Installing Engineer in which he said that his work was complete and that he could not do anything further because the electricians had not finished their end and this we presume to be your Company. Yesterday we received another letter from him which we understand that the work is now complete and that they propose to run the first plant for 24 hours but cannot use it any further for [99] a month or two as the building will not be complete.

This would make it appear that both you and we are going to be delayed somewhat in our work, yet as we have already shipped the second engine and presume that you people have shipped the second generator, the second unit should be installed very

shortly and we have no doubt but that Col. Spalding will allow testing out of each plant as it is completed so that the payments should not be delayed much beyond the expected time.

We have written to our agents in Portland and asked them to exert every effort on our behalf to obtain a prompt remittance from Col. Spalding and would suggest that you write and ask your Mr. Wernicke to co-operate with them in seeing that your end of the contract is complete in all its details and obtain acceptance therefor.

We feel that it is just as well to write at this time explaining the reason you did not receive your money July 15th so that the harmonious relations existing between the two Companies will not be marred by some misunderstanding.

Yours very truly,  
SAMSON IRON WORKS.

By S. H. HEAD.

**Exhibit [Letter, August 8, 1910, A. M. Irwin to  
Samson Iron Works].**

8—8—10.

Samson Iron Works,  
Stockton, Cal.

Gentlemen:

Att.: Mr. S. H. Head.

Yours of the 4th inst. received, relative to our invoice #8137, in the amount \$1,500.00, covering partial shipment on contract of May 25th, 1910, and in reply would state, that the contract is, as you advise, assumed in its entirety by the Samson Iron Works, but it is not, as you advise, a joint contract, and

should not, or cannot be considered as such. We have no contract whatsoever with the Spalding People, but our contract is direct with you.

Regarding the payment, we wish to quote from the terms:—

“This first unit has to be in operation by July 1st., 1910, and it is agreed and understood that payment in the amount of \$1500.00 will be made on the total contract price, immediately upon installation and acceptance, which payment will not be made later than July 15th, 1910.”

You will note payment was to be made not later than July 15th, 1910, and not as you state on July 15th, or immediately upon installation and acceptance.

Installation, you advise in your letter, has been completed, and we would therefore respectfully request the payment be sent us in line with terms, inasmuch as due date has been exceeded approximately three weeks.

Very truly yours,

A. M. IRWIN,

Ass't. to Treasurer. [100]

**Exhibit [Letter, August 9, 1910, Samson Iron Works to Westinghouse E. & Mfg. Co.].**

Stockton, Cal., Aug. 9, 1910.

Westinghouse Electric & Mfg. Co.,

#165 Second St.,

San Francisco, Cal.

Attention, CET.

Gentlemen:

There never was an agreement between two parties

wherein one party, having absolute confidence in the other party, gave them a contract to do certain work with which the first party was perfectly unfamiliar, without there was a certain amount of give and take. When your Mr. Wernicke wrote out the specifications for the Electrical part of this contract, the writer said that it was no use him going over the specifications inasmuch as he had not any idea of what would be required, except in a general kind of way, and that it was up to your people to give Col. Spalding a good job and supply everything that would be required. This Mr. Wernicke assured the writer was in the specifications and the writer believed him. When it came down to the business part of the contract the writer acknowledges that he knew a whole lot more about it than he did about the electrical end of it, and he objected to the insertion of that specified time in the contract but Mr. Wernicke pointed out that payment would fall due immediately upon installation and acceptance, and that it was simply a matter of form for your home office and so that they could base some definite approximate time of payment, that this date was inserted. The writer having had quite a great many business dealings with the Westinghouse in the past and having an exceedingly high regard for all of the old men in the San Francisco office and knowing that in the past it had always been the policy of the Westinghouse Company to meet the other fellow more than half way, felt that in spite of his business judgment, he was safe in signing the agreement as it stood, in behalf of his Company, and he still feels that



as it can only be a matter of a few days before the plant will be accepted by Col. Spalding, that you will still await the clause, "Immediately upon installation and acceptance."

At the same time the writer wants you to thoroughly understand that Samson Iron Works does not and has no need to plead poverty. They are amply able to meet this account but feel that in view of the thorough verbal understandings which we had at the time with your Mr. Wernicke and of the talk which we had with your Mr. Bean, that although it is perfectly true as you say that the electrical end of this contract is not a joint contract and cannot be considered as such, that you people should not attempt to insist upon payment from us until we have had an opportunity to find out whether or not your end of the work is satisfactorily concluded.

Yours very truly,

SAMSON IRON WORKS.

By S. H. HEAD.

**Exhibit [Letter, August 24, 1910, A. M. Irwin to  
Samson Iron Works ].**

8-24-10.

Samson Iron Works,  
Stockton, Cal. [101]

Gentlemen:

Att: S. H. Head.

Referring to your letter of Aug. 15th, regarding first generator furnished on contract of May 26th, 1910, would state that we have just been advised by our Mr. Wernicke that the trouble your representative referred to was not due to any fault of our ap-



paratus, but was in reality in the couplings and shafts furnished by the Samson Iron Works. Mr. Wernicke states that this was conclusively proven to your representative and that he has written you a letter which will place the matter before you clearly.

We again ask that inasmuch as our end of the contract has been complied with to date, you arrange to favor us with the \$1500.00 due.

Please favor us or advise if there is now any reason for withholding the same.

Very truly yours,

A. M. IRWIN,

Ass't. to Treasurer.

**Exhibit [Letter, August 25, 1910, Samson Iron Works to Westinghouse E. & Mfg. Co.].**

Stockton, Cal., Aug. 25, 1910.

Westinghouse Electric & Mfg. Co.,

#165 Second St.,

San Francisco, Cal.

Gentlemen:

Attention Mr. Irwin.

Your letter to hand and contents noted, and in reply would state that your contract called for a delivery complete of your 75 K. W. Generator to be in operation by July 1st., 1910, "And it is agreed and understood that payment in the amount of \$1500.00 will be made on the total contract price immediately upon installation and acceptance which payment will not be made later than July 15th, 1910." Despite whatever assurance your Mr. Wernicke may have made you, we beg to state that we have not at this date received a single Generator from the Westing-

house Company complete. On August 19th, the Sole Plates, evidently some necessary part of the machine, were only being made. On August 15th, it was discovered that the Westinghouse Electric & Mfg. Co. erected only part of the Generator, for on this date, whilst you were asserting that your Generator was complete, it was short some coil making it impossible to run it under any conditions.

In short about the only terms of your contract which appeal to you is that we should make payment to you of \$1500.00 on July 15th.

Providing you fulfilled certain conditions which were that you should have your Generator installed for our acceptance on July 1st., then we should pay you \$1500.00 immediately upon installation and acceptance which payment will not be made later than July 15th. Another provision in the contract you agree to have both the other units in Portland in 90 days from May 25th. We haven't so much as heard these Generators have been shipped from Pittsburg, a direct violation of your contract with us.

It is true that the coupling between the Generator and the engine was 4/1000" out of true, an accident liable to occur in the very best regulated factories and one which [102] could have been remedied within a couple of days had we been able to find out whether your Generator would successfully operate or not; therefore, it is impossible for you to think that we delayed your work in any way.

We beg to notify you that we have not and will not under any circumstances accept your Generator nor any other part of your machinery until you have

conclusively proven to us that you have done the work specified in your contract with us which is that you are to supply a Generator together with all necessary electrical equipment to deliver 75 K. W.'s in one instance and 100 K. W.'s in another instance to a switchboard when direct connected to our engine and we further notify you that inasmuch as you have violated your contract with us, the same is void and of no effect.

It is not pleasant to be forced to write a letter of this kind to your Company and we would suggest that instead of attempting to collect money from us which is not due and in no sense belongs to you, that you get busy and do the very best you can toward rectifying the broken promises you made to us in your contract of May 25th.

Yours very truly,

SAMSON IRON WORKS.

By S. H. HEAD. [103]

**[Testimony of B. C. Ball, for Plaintiff.]**

B. C. BALL, called as a witness for plaintiff, testified:

My name is B. C. Ball. I reside at Portland. I am a mechanical engineer and have been for about twenty-five years. I have known Samson Iron Works since about two years. I was employed by the Samson Iron Works to test a gas engine. It was located in the basement of the Spaulding Building. There was an electrical generator attached to the gas engine. The circumstances under which I was called upon to test the gas engine were as follows:

The first connection I had with the engine was

(Testimony of B. C. Ball.)

when Mr. Mitchell came down to my office to see about having a special pulley made to be used in connection with the brake to determine the horse-power developed by the engine. Some few days after that, Mr. Mitchell asked me if I would make a test of the engine to determine the maximum horse-power. I finally consented to make this test; and he secured, in addition, to other men who acted as witnesses to the test. They were mechanics bearing good reputations in Portland, by the name of Helser and Undine. I made a test of the engine in the presence of Mr. Mitchell, Mr. Helser and Mr. Undine, who all corroborated the measurements and observations, and after the test I figured up the results and reported them in a letter to the Samson Iron Works. The maximum horse-power developed by the engine was about 78 horse-power.

My technical education was obtained at the Stevens Institution of Technology, Hoboken. I have a degree of Mechanical Engineer.

Mr. Mitchell made some remark about the capacity of the engine and stated that he knew the engine could not develop the amount of power required.  
[104]

The method of testing used is called Prony brake test. It is recognized as being a very satisfactory and extremely accurate test. It is mentioned by text writers.

A demand was made upon defendant to produce the original letter written by Mr. Ball to defendant. It was not produced. Mr. Ball thereupon identified



a carbon copy thereof and it was offered and admitted in evidence and was as follows:

**Exhibit [Letter, September 10, 1910, B. C. Ball to  
Samson Iron Works].**

Sept. 10, 1910.

Samson Iron Works,  
Stockton, Calif.

Gentlemen:

At the request of your Mr. Mitchell, I made a brake test of your engine in the Spaulding Building yesterday, the results of which are given below:

Length of beam from center of shaft to point of contact with scales 9 ft. 8".

Weight of beam carried by scales with everything slack and engine not running 60#.

(In order to get this weight accurately, the beam was lifted from the wheel and laid across the face of the wheel, which acted as a knife edge.)

Gross weight with engine pulling maximum 232#.

Net weight 172#.

Speed 245 revolutions.

From the above figures, you will see that the engine developed only 78.5 H. P. In order to be sure that the engine was not being controlled by the governor, Mr. Mitchell screwed the governor stem back, so that the governor was not controlling the speed. The brake was screwed down to give as near 250 revolutions as possible and I am convinced that the engine cannot develop more than 80 H. P. with the gas of the richness supplied by the Portland Gas and Coke Company. Just what the heat value of



this gas was at the time of the test, I am not able to state, as no test was made of it.

Enclosed I am sending bill for services in connection with the testing of this engine.

Hoping that the results of this test will be of some use to you, I am,

Yours very truly,

B. C. BALL.

Mr. Ball identified the reply of defendant to said letter. It was offered and admitted in evidence and was as follows: [105]

**Exhibit [Letter, September 12, 1910, Samson Iron Works to W. M. Ball].**

Stockton, Cal., Sept. 12, 1910.

Mr. W. M. Ball,

c/o Williamette Iron Works,

Portland, Ore.

Dear Mr. Ball:

Your report of the Test of the engine, to hand. We had already received a telegram from Mr. Mitchell from which we understand that he found it impossible to keep up a sufficiently steady pressure on the Gas Mains to obtain 250 revolutions per minute. Do you not think that it is also possible that the strength of the gas was low on the day on which you made the test? It looks very much to us as though it would be impossible for an engine to run off City Gas which is variable both in pressure, richness, and B. T. U.'s unless one had an engine very largely in excess of its actual rated capacity, and

should be glad to hear from you what you think about it.

Yours very truly,  
SAMSON IRON WORKS.

By S. H. HEAD.

**Cross-examination.**

The amount of power varies to a certain extent with the perfection or imperfection of the fuel. I made no test of the fuel that was used at the time. I have no knowledge about the gas whatever that was used. I know nothing about the engine except under the conditions of operation as they existed at that time. Mr. Mitchell was in charge of the operation and he was to give the engine as much power as he could generate when I tested it. I would not want to be understood as condemning the engine generally, but only that under the test that was made at that time, she could not give the generator its full power. That is only a theoretical conclusion of mine. I made no attempt to generate the current. Mr. Mitchell at that time said to me that he could not develop the power with that gas. [106]

**[Testimony of E. R. Rhodes, for Plaintiff.]**

E. R. RHODES, called as a witness in behalf of plaintiff, testified as follows:

I have been in the electrical business for ten or twelve years. If a machine built according to certain electrical specifications had been tested for temperature and found, as far as the temperature requirements were concerned, to be well within the contract specifications, that fact establishes the efficiency of that particular machine.

(Testimony of E. R. Rhodes.)

The contract in suit—exhibit 1 for plaintiff—specifies:

1—75 KW. compound wound direct current  
E. T. 3-wire generator 250–125 volts 275  
RPM. complete with all three wire parts  
and field rheostat,

and

1—100 KW. compound wound direct current  
E. T. 3-wire generator 250–125 volts 250  
RPM. complete with all three wire parts  
and field rheostat.

I had to do with the preparation of these generators for shipment. They were completed but not shipped. We were ready to ship them when word was received by the plaintiff that defendant had repudiated this contract—exhibit 1—with plaintiff. The switchboard mentioned in this contract was also completed and ready for shipment. It was, however, dismantled, part turned in to stock and part scrapped because of the repudiation of the contract by defendant. I made an effort to sell it without dismantling. I looked specially into the possibility of applying it to an order on hand, but I could not find sale for it. The loss was \$263.82.

In connection with the two generators which I have just mentioned, the bed-plates could not be used in disposing of them and were a complete loss. They amounted to \$40 and \$50, respectively.

The second and third generators called for by the contract—exhibit 1 for plaintiff—were resold for \$2,477.67. Their [107] market value at Pitts-

(Testimony of E. R. Rhodes.)

burgh in September, 1910, was \$2,663.50; in Portland, Oregon, \$2,827.10. The freight charges upon these generators between Pittsburgh and Portland would have been \$305.60 at that time.

Plaintiff purchased and paid for, in the performance of that said contract, the following cable at the following prices:

525 ft. 500,000 C M Cable .....	\$216.58
105 ft. 750,000 C M Cable .....	61.53
310 ft. No. 2 Cable .....	21.56
80 ft. No. 6 Cable .....	3.01

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making total of.....\$303.68

This was purchased July 23, 1910, from the Industrial Engineering Co., 71 Fifth St., Portland, Oregon, to fulfill the requirements of the contract. The prices just mentioned were the generally prevailing prices of cable of the class specified on the date mentioned. The cable was billed to defendant at \$330.50, which was a reasonable and fair billing price in line with general custom.

The two generators which I have mentioned were built for this contract. Upon receipt of a telegram from our Portland office I instructed the shipper not to ship anything at all until further advice. [108]

**[Testimony of C. Streamer, for Plaintiff.]**

C. STREAMER, called as a witness in behalf of plaintiff, testified as follows:

I am employed in the switchboard division of plaintiff. Switchboard units are not standard material held in stock by the plaintiff.



(Testimony of C. Streamer.)

The freight on the switchboard called for by the contract—exhibit 1 for plaintiff—from Pittsburg to Portland would have been \$100.80. [109]

**[Testimony of W. H. Haggerty, for Plaintiff.]**

W. H. HAGGERTY, called as a witness in behalf of plaintiff, testified as follows:

I am in charge of the switchboard division of the estimating and cost department of plaintiff. The switchboard mentioned in the contract—exhibit 1—was built expressly for the Samson Iron Works. Its cost was \$1,531.65, comprising parts costing \$1,330.40 and labor costing \$201.25. [110]

**[Testimony of Percy E. Davidson, for Plaintiff.]**

PERCY E. DAVIDSON, called as a witness in behalf of plaintiff, testified as follows:

Practically all my life I have been an electrical engineer. I was employed by the Westinghouse Electric & Manufacturing Company on April 12, 1907. I was a tester of generators and other electrical apparatus. I had charge of the testing of the certain 75 KW generator, serial No. 461,762, which is scheduled in contract marked "Exhibit 1," for plaintiff. Test sheet marked "Exhibit 2" is a true and correct record of the test; my name is appended to said test sheet. This test sheet shows that the 75 KW. generator operated for four hours at full load, which is long enough to insure its temperature becoming practically constant, and for this particular type of machine is a reasonable time to determine whether the heating had reached a maximum, and whether the power rating could be determined



(Testimony of Percy E. Davidson.)

within the contract requirements. The test sheet shows that the actual temperature is well within the test guarantee of contract and fully satisfied the terms of the test guarantee as specified in the contract. [111]

**[Testimony of J. E. Logan, for Plaintiff.]**

J. E. LOGAN, called as a witness in behalf of plaintiff, testified as follows:

I have been in the employ of plaintiff since May 16, 1899. I am in the switchboard department. The contract in suit—exhibit 1, for plaintiff—refers to a switchboard consisting of three generator panels and one load panel. This switchboard was built complete and was ready for shipment by plaintiff from its factory in Pittsburgh but was not shipped but was dismantled and certain parts were turned in to stock and certain parts scrapped. Switchboard units are not standard material held in stock by plaintiff.

The cost of this switchboard was \$1,531.65. The materials therein which were turned into stock and used again after dismantling the switchboard were of the value of \$1,253.80. The value of the material scrapped was \$14.03, making a total of \$1,267.83. By scrapping material I mean that the material was of no use to us—material that could not be used again. [112]

**[Testimony of David Hall, for Plaintiff.]**

DAVID HALL, called as a witness for the plaintiff, testified:

My name is David Hall. I am a designing electrical engineer and have been employed with the plaintiff company nearly five years. I have been employed as a designing electrical engineer about fourteen years.

Plaintiff's exhibit 2 is an original test sheet of machine #461,762 built according to electrical specifications #52,739. It shows a full load temperature test.

I would say that the first unit mentioned in the contract—Plaintiff's Exhibit 1—the machine in suit, was better than the contract guarantees as to both efficiency and temperature. [113]

**[Testimony of F. W. Winn, for Plaintiff.]**

F. W. WINN, called as a witness for plaintiff, testified:

I act as superintendent for all the buildings owned by Colonel Spalding in Portland, Oregon, with the exception of the Portland Hotel, including the Spalding Building. The Samson Iron Works during the months of July, August and September, 1910, installed two gas engines, tested one, and removed both of them.

A Prony brake test of the gas engine by defendant was made there. The result of this test did not prove satisfactory and the engines were removed.

There were some of the tenants had moved into the building the latter part of August and we needed

(Testimony of F. W. Winn.)

power to run the elevators and to furnish light. The power that was necessary was the power sufficient to develop 75 kilowatts, which was the rated power of the generator.

The sole cause of directing the Samson Iron Works to remove their machines from the building was the failure of the engine to develop the horsepower required. The failure of the Samson Iron Works to have the second or third units, or either of them, installed in the building at that time was not to my knowledge the reason for this action.

[114]

**[Testimony of Andrew Murray Hunt, for Plaintiff.]**

ANDREW MURRAY HUNT, called as a witness for the plaintiff, was sworn and testified as follows:

Mr. LEVY.—The witness' competency is stipulated.

Mr. FRANK.—Yes.

Mr. LEVY.—Q. According to proper practice and standard engineering methods, what is the usual manner of erecting and installing a unit consisting of a gas engine and a 75 kilowatt engine-type generator, with particular reference to the sequence in which the various parts are installed?

A. Assuming that the gas engine and engine-type generator are the usual type of a three-bearing machine, or the generator carried by a single outboard bearing, the first step would be the preparation of an adequate foundation for carrying the unit in its entirety; secondly, the mounting upon the foundation of the engine and the base which was to carry

(Testimony of Andrew Murray Hunt.)

the generator, mounting upon this base the outboard bearing, lining that up with the engine bearing; the placing of the engine part—if the generator were a horizontal split machine, the placing of the lower half of the field in position, then placing the shaft carrying the armature in its position, and then the upper half of the generator. If the generator field were split vertically, the armature and its shaft would be mounted in place and then the two halves of the generator field placed in position and slid together so as to surround the armature, and bolted together.

Q. If it developed that in such an installation, the gas engine company failed to furnish a bed-plate for the generator, how would your answer to that question be affected?

The COURT.—Q. A proper bed-plate for a generator is an essential feature of the construction, is it not? I am not speaking now as to who is to furnish it. [115]

A. It may or may not be, your Honor.

Q. How do you mean?

A. In very large machines, frequently the generator is mounted without an extended base. In small and moderate-size units, it is almost the universal practice—

Q. (Intg.) Well, take a 75 kilowatt unit then; let us deal with concrete matters, and not with abstractions; take a 75 kilowatt installation.

A. The general practice is to employ an extended bed-plate on which the generator is mounted. In



(Testimony of Andrew Murray Hunt.)

my experience, based upon a rather extended knowledge of the business, it is furnished in a vast majority of cases by the engine builder.

Q. Is a bed-plate any part of the generator?

A. It is not.

Q. In a contract between an engine company and an electric company, in which the electric company agrees to erect, furnish and install a 75 kilowatt engine-type generator on the foundations of a certain building, together with a switchboard, and cable for connections, state in detail what, according to standard engineering practice such a generator comprises?

A. Where no special stipulations are made which govern and control, common practice would indicate that there should be furnished the field frame, all the field frame armature and all the attachments which form a part of the generator, or in connection with its electrical operation.

Mr. LEVY.—Q. Is the shaft upon which you state the armature is pressed, any part of the generator, proper?

A. It is not so considered and is usually not furnished with the generator.

Mr. LEVY.—Q. Assume that we have the ordinary engine, an engine of ordinary efficiency, what rating should such an [116] engine have to deliver 75 kilowatts as the result of the operation of the unit?

A. Approximately 110 brake horse-power.

Q. If the generator is kept in a corrugated iron



(Testimony of Andrew Murray Hunt.)

building, having a concrete foundation and floor, with windows and a single door, closed to keep out the moisture, and being subjected to no undue heat, would it suffer any material deterioration?

A. I do not see how it could.

Q. Take, for example, the period of three years, what would be your answer?

A. I do not believe that material injury would occur. I do not believe that a temperature of 100 to 130 degrees Fahrenheit would produce any injury, whatever. And as far as moisture is concerned, unless moisture were present in sufficient quantity to cause condensation upon the metal surfaces of the machine, I do not see how injury could occur. Injury due to moisture would probably be apparent to visual inspection; if the result would show in rust formation upon the bright steel or iron surfaces, or that even that rusting might take place without deterioration to any of the vital parts. As far as injury arising from elevated temperatures is concerned, it would not be evident probably upon visual inspection, unless the temperature had been very high. Such deterioration due to the elevation of temperature not sufficient to produce blistering of paint could probably only be detected by operating the machine, or by electrical test.

Q. If a generator is operated without apparent difficulty, and carries a load of approximately 50 or 52 kilowatts, and its commutation is first-class, what would that indicate as to its condition generally, and as to any deterioration?

(Testimony of Andrew Murray Hunt.)

A. That its condition was good, and that no material deterioration had taken place. [117]

Cross-examination.

The amount of power delivered from an engine depends upon the nature of the fuel that is used, and it varies according to how the heat units in that fuel vary. With a sufficiently high fuel, it will exceed its rate capacity, if it is rated on a lower-grade fuel. So what is rated as a 100 horse-power engine might, with proper fuel, deliver 110 or 114 horse-power.

Q. With reference to the sole-plate or bed-plate that you were speaking of, generators and engines, with their connections, are made in all sorts of ways, are they not; sometimes an engine is made with an extended bed-plate, which will carry the generator, and sometimes it is not; is not that correct?

A. It is so done, but there is an established practice and custom.

Q. What do you mean by established practice and custom?

A. There is an established practice and custom which dates back to the year 1901, when a committee was appointed by the American Society of Mechanical Engineers to go into the matter of harmonizing and standardizing the construction of electrical generators and gas engines. The matter was thoroughly gone into before the committee, and the committee submitted a report. Their report has been generally followed by engine builders throughout the country. It was done to crystallize the practice

(Testimony of Andrew Murray Hunt.)

at that time, because just shortly before that the use of direct connected generators had come into vogue, and there was a considerable amount of misunderstanding frequently arising under contracts, and it was an attempt to harmonize those conditions and to establish something which could be used as a standard that this matter was taken up by the American Society of Mechanical Engineers.

Q. But that is not a matter that the people generally who deal in these things have knowledge of; that is a matter for engineers [118] of your type, consulting engineers?

A. No, sir, it is not; it is a matter which is of common knowledge to engine builders. Engine builders were upon the committee, and full and complete conference and correspondence were had with the engine builders before this report was framed. Notwithstanding that these units are built as I say very frequently sometimes with a single bed-plate and sometimes with an independent bed-plate for the generator, there is no limitation, both types of construction are adopted.

#### Redirect Examination.

I would say that I have never seen a generator of 100 kilowatt or smaller directly connected to an engine mounted except upon an extended bed-plate, with but one exception; that was an engine in which what is known as the cross-compound type was used, consisting of one cylinder upon one side, with another upon the other, with a generator mounted in the center between. [119]

**[Testimony of Carl L. Wernicke, for Plaintiff.]**

CARL L. WERNICKE, called as a witness for the plaintiff, testified:

I mailed this contract to Pittsburgh from Portland, Oregon. The first generator was shipped from San Francisco here on June 11, 1910, and allowing three days for transit by steamer and one day for getting it into the basement of the building, it was probably there by June 15th, 1910. The field frame was vertically split. We kept continually in touch with the erection as it went along and had Mr. Wilson on the ground when it was time for him to erect the generator.

The COURT.—Q. What was that time? That is what we want to get at. Of course, your conclusion that it was within time, is not evidence. It is for the jury to determine whether it was within time. What was the time that you had him there?

A. I do not remember the first time that Mr. Wilson came to Portland, I think though it was in the early part of July, however.

The reasonable and the market value, approximately, of the first generator in Portland, in the year 1910, was \$1,300.

The first intimation that I got that an extended bed-plate was not going to be furnished by defendant with the gas engine was when I saw the blueprints of the gas engine which did not show any extended base on which to mount the generator. I took the matter up with the Samson Iron Works and called their attention to the fact that no extended



(Testimony of Carl L. Wernicke.)

base for the gas engine had been provided and that it would be necessary to have form of [120] bed-plate on which to mount the generator, and I suggested that they order these additional bed-plates from us, as we could furnish them. At the same time I also took the matter up with our factory and requested them to add these bed-plates to the order.

Owing to the fact that the bed-plates for the first 75 kilowatt units could not be shipped prior ot the time that the second 75 kilowatt machine and the 100 kilowatt machine were shipped from the works it became necessary to take care of the first units by a temporary bed-plate which consisted of wooden blocks; the desire was to have the wooden blocks the same height [121] as the standard bed-plate would be, but to mount to generator on the wooden blocks temporarily until the bed-plate got back to Portland. That was done.

I have forgotten the exact date just now, when the cast iron bed-plate was delivered to the job there, but it was just a day or two after the testimony shows that the shaft was taken out to be trued up.

I had a conversation with Mr. S. H. Head, the manager of the Samson Iron Works, on or about the 1st or 2d of September, 1910.

After the various tests had been made which have been testified to before, and it was finally found out that they could not get the first unit to operate satisfactorily, Mr. Head advised me that Colonel Spalding had told them that it would be necessary for



(Testimony of Carl L. Wernicke.)

them to take all of the apparatus out of the basement of the Spalding Building as they had lost their contract. At the time, which was on the morning of September 2, 1910, the situation, as I recall it, was that the Samson Iron Works had been told to take their apparatus out; Mr. Head and I were talking over the matter unofficially and I was asked what sort of an arrangement our company would make to let the Samson Iron Works out of their contract with us, and unofficially I replied that we would probably make every allowance we could and list those machines which were still at the factory on the stock sheet and endeavor to dispose of them for them, and also help them get rid of the generator which was in Portland, but that we probably would not accept cancellation of the contract.

The reasonable cost of installation of the second and the third generators and the permanent switch-board there at Portland would have been approximately \$400. [122]

The witness identified the following letter, which was admitted in evidence:

**Exhibit [Letter, Westinghouse E. & Mfg. Co. to  
Samson Iron Works].**

Samson Iron Works,  
Stockton, Calif.

Attention Mr. S. H. Head, Sales Mgr.

Please refer to our contract with you covering generators and switch board for the Spaulding Building of this city and note that at the time you placed this order with us there was no mention made

of the fact that bed plates would be required with these generators, it being understood that you were to take care of the proper foundations upon which to place these generators. In other words, it was more or less the intention at that time, for you to have a solid bed plate under both the gas engine and the generator, which would give it a firm foundation.

As we understand the matter now, judging from the present engine which is now installed in the building, you have furnished only a bed plate for the engine and none to go under the generator. It therefore became necessary for us to furnish bed plates for these generators, and on consultation with Mr. S. H. Corbett of the Industrial Engineering Co. the writer advised the factory to supply the necessary bed plates for all of these generators.

These bed plates will come to a total of \$105.00 or approximately \$35.00 each, and we would ask that you kindly give us your authority to bill you in this additional amount. It will not be necessary to modify our present contract by a supplemental proposal including these bed plates, but simply your advice to the effect that we should furnish these bed plates will be sufficient and they will be billed to you separately from the balance of the contract covering the apparatus.

Trusting we will receive this authority from you shortly, we are,

Yours very truly,

WESTINGHOUSE ELECTRIC & MFG.  
CO.

(Testimony of Carl L. Wernicke.)

Cross-examination.

Q. I call your attention to this portion of your letter which was just read to the jury by Mr. Levy:

It will not be necessary to modify our present contract by a supplemental proposal including these [123] bed-plates will be sufficient, and they will be billed to you separately from the balance of the contract covering the apparatus.

Trusting we will receive this authority from you shortly, *we, yours* very truly, etc.

Why did you make that suggestion if at that time you considered it was their duty to furnish the bed-plates?

A. Because there were no bed-plates included in our contract.

Q. You did not consider there were any bed-plates included in that contract, and you wanted your authorization to charge them with them extra?

A. Yes, sir.

Q. And you suggested it would not be necessary to modify the contract?

A. We would handle it that way in order to avoid the necessity of a supplemental proposal. In reply to that letter I received the following letter:

**Exhibit [Letter, August 9, 1910, Samson Iron Works  
to Westinghouse E. & Mfg. Co.].**

Aug. 9, 1910.

T SHH

Westinghouse Electric & Mfg. Co.,  
Couch Bldg., Portland, Ore.  
Attention R 20747.

Gentlemen:

Thus far the writer can hardly say that he is tickled to death with the manner in which your Company has treated us on the Spalding Contract. In the first place, the writer told you that he didn't know anything about the electrical end of this proposition and that it was up to you people to furnish it all. He is confident that it was you, yourself, who suggested that there was no need for bed-plates under the engine and we didn't contemplate using any. The writer also asked you what we had to furnish and the only thing which you told him was necessary for us to furnish would be the Armature shaft. Now for the life of him, he cannot see why your company should want us to buy some bed-plates at an approximation of \$35.00 each to be put underneath your generators. This company did not start to hunt up somebody when we found it was necessary to purchase a gas regulator, owing to the uncertain pressure of the city gas, at a cost of \$180.00 to us which we certainly didn't figure on.

In all contracts of this kind there is a certain amount of give and take and there were many little things which became necessary that we should fur-



nish which the writer did not figure on but he certainly expected his own company to furnish these little parts, and it rather surprises him that a company of the size of the Westinghouse Electric & Mfg. Co. should come to us and ask us to supply some bed-plates which they find necessary to put underneath [124] their generators to install them properly.

Another thing is that before the writer signed the agreement with you, giving you the entire electric end of the business, he was quite exercised about a clause which you inserted in the contract, specifying that your end of the plant was to be paid for by us upon installation and acceptance not later than July 15th. However, he relied upon your word and what he had previously known of the Westinghouse Company, and signed it, because as you yourself said, the payment was due upon installation and acceptance.

We are creditably informed that it is only within last very few days that your people have completed their end of the work and yet without our ever having an opportunity to test out the correctness of your installation, your company is, to say the least of it, insistent that we make payments according to the literal wording of the contract.

It is a long while since the writer signed a contract with anybody agreeing to pay for it at a certain specified time whether the other fellow delivered the goods or not and was very much against his judgment, and he is now wondering whether he treated his own company right in not accepting the figures of one your competitors which were less than yours and on terms which would have been made absolutely satisfactory to his company. Although Samson



Iron Works are not as large a concern as the Westinghouse Electric & Mfg. Co., they are a concern with a very high reputation and are amply able at all times to meet any obligation which matures, and it is to be greatly regretted that your company should propose to take the stand it is taking in view of the fact that we are doing a large business not only in California, Oregon and Washington, but in every part of the Pacific Coast, and might be quite considerable purchasers of your machinery for electric lighting works especially.

Awaiting your immediate reply, we are,

Yours very truly,

SAMSON IRON WORKS.

By \_\_\_\_\_.

I have testified to a conversation which I had with Mr. Head on September 2d.

Q. How do you fix September 2d as the date of the conversation? A. By the following wire:

**Exhibit [Telegram, September 2, 1910, Carl L. Werneckie to E. P. Dillon].**

Postal 86.

Portland, Ore., Sept. 2, 1910.

E. P. Dillon,

Samson Iron Works D. C.

13000

864.

Hold all shipments. Will write full particulars.

CARL L. WERNECKIE.

That is the only communication I had with the Pittsburgh Company until I wrote the same day. I remember receiving a [125] letter from some attorneys in Portland on the subject. The letter is as follows:

**Exhibit [Letter, September 6, 1910, Samson Iron Works to Westinghouse M. & E. Co.].**

September 6th, 1910.

Westinghouse Manufacturing and Electric Com-  
pany,  
Couch Building,  
Portland, Oregon.

Gentlemen:

You are hereby notified that the Spalding Com-  
pany has refused to accept the power plant being  
installed in the spalding Building by us. We had a  
contract with you to furnish generators to us which  
would develop a certain given capacity and a certain  
efficiency. The first generator furnished by you was  
not sufficient in any way and, on account of the delay  
in furnishing the generators by you and the insuffi-  
ciency of the first generator, we have lost the con-  
tract of installing the plant in the Spalding Build-  
ing, all of which we consider to be due to the failure  
on the part of your company to carry out its con-  
tract, and this is to notify you that we shall hold you  
responsible for all loss and damage to us on account  
of the loss of this contract.

Yours very truly,  
SAMSON IRON WORKS.  
S. H. HEAD.

Stamped:

Received  
Sept. 7, 1910.  
Westinghouse  
Portland [126]

Plaintiff here rested its case.

**[Testimony of J. M. Kroyer, for Defendant.]**

J. M. KROYER, called as a witness on behalf of defendant, testified:

Q. What number of B.T.U's of gas is necessary to develop 100 horse-power in a 100 horse-power gas engine?

Plaintiff objected to the question as not material for the reason that it made no difference how many B. T. U's it took to develop 100 horse-power. The quality of the gas played no part in the controversy and the only question was whether defendant gave plaintiff horse-power enough to drive the generator. The character or quality of the fuel procured for the gas engine was not relevant to the issue.

The objection was overruled and an exception noted for the plaintiff.

**Exception No. 1.**

(Witness answered:) A. Not less than 650 B. T. U.'s would develop in that engine the 100 horse-power. Ordinary illuminating gas is said to contain from 675 to 810, but to be conservative we base our calculations upon it being 650.

Q. In your business you do a great deal of freighting, do you, from the east, from the vicinity of Pittsburgh and other points equally distant?

A. Yes, sir.

Q. Can you state how long it would take in 1910 to freight an apparatus such as a generator from Pittsburgh to Portland?

Plaintiff objected to the question as incompetent and immaterial under the terms of the contract

(Testimony of J. M. Kroyer.)

which required plaintiff to deliver two subsequent generators not at Portland but for shipment at the factory. The Court overruled the objection, to which ruling plaintiff noted an exception.

### **Exception No. 2.**

(The witness answered:) A. We figured at that time that 21 [127] days for freight to come from East Pittsburgh or Philadelphia; now we get a little better delivery, about 18 days we figure now.

Q. State what the detail is of the damages and losses by reason, as we claim, of the failure of these parties to carry out their contract.

Plaintiff objected to the question upon the ground that there was no proper foundation laid, and also upon the ground, as the record showed, that demand for a bill of items of defendant's cause of action by way of counterclaim was made a month prior and the bill of items was received one day before the trial and four days before the time upon which this proceeding took place.

It appeared that when the demand for a bill of items of the counterclaim was made by the plaintiff on the defendant, the case had been pending for a couple of years; that the plaintiff had been served with a bill of particulars, amended bill of particulars, and then again with another amended bill of particulars. Finally plaintiff served defendant with a notice to produce a bill of particulars. Counsel for defendant sought for the papers, which had been in his possession but could not find them. He did not know what had happened to them,

(Testimony of J. M. Kroyer.)

until finally it occurred to him to telephone to Stockton. It thereupon appeared that defendant had taken the papers away months before. As soon as counsel could obtain the papers, the bill of particulars was delivered to plaintiff. A cross-complaint had been filed two years before the first application by the plaintiff for a bill of particulars. Said application was made just a month before the trial.

The Court overruled the objection, to which ruling plaintiff noted an exception.

**Exception No. 3.**

(The witness answered:) [128]

To freight on engine and parts shipped June 23d .....	\$ 58.23
To freight on engine shipped Aug. 1st. ....	72.40
Freight on return of machinery from Portland to Stockton...	95.35
Crating and cartage of engine at Stockton .....	60.00
	<hr/>
	\$258.98
To 70 days labor of C. E. Mitchell dating from June 23d to Sept. 19, 1910 at \$4.00 per day.....	280.00
His living expenses, common labor and material purchased by C. E. Mitchell during the above period .....	727.15
	<hr/>
Total	1,007.15



(Testimony of J. M. Kroyer.)

Industrial Engineering Co.

To services rendered, paid on Feb.

7, 1911 ..... 500.00

To 19 days services of S. H. Head

at \$8.00 per day ..... 152.00

To expenses incurred by our Mr.

S. H. Head while in San

Francisco ..... 63.45

Ditto in Portland ..... 242.00

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457.45

To 3 days services of J. M. Good-

win at 7.00 per day..... 21.00

Expenses incurred ..... 7.30

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Total 28.30

Hottenworth & Maskell, Portland.

662.59

To pipe, pipe fittings and  
labor

Total

Chas. F. Pedersen

For services rendered in

handling machinery into

Spalding Bldg. in July.. 60.00

To services ditto in Aug. sec-

ond engine ..... 78.50

---

Total 138.50

Safety Stove-Pipe & Steel Metal Co.

To making pan and tank July

20th ..... 7.00

(Testimony of J. M. Kroyer.)

Putting flange on Pipe Aug.	
6th .....	8.00
Making pan and tank Aug.	
17th .....	7.00
<hr/>	
Total	22.00
Western Union Tel. Co. To mes-	
sages sent to Port. ....	13.12
Telegrams & Stenographers ser-	
vices.. ....	21.80
Nicolai-Neppach Co. ....	4.65
Helzer Unden Machine Works,...	149.75
P. E. Eng. Co.....	.50
B. C. Ball, services .....	50.00
Crown-Columbia Co.....	15.25
Hagermann & Foard Co.....	2.80
Muirhead & Murhard Co.....	3.10
Preer Cutlery Co. ....	.90
Helser Bros. ....	60.00
Olsen Roe Co. ....	17.00
Willamette Iron Works .....	87.50

Our lost profit was \$4040.

Plaintiff moved to strike out the foregoing testimony upon the same grounds as stated in its objection. The motion was denied.

#### **Exception No. 4. [129]**

In the operation of gas engines with gasoline, a pint of gasoline would run an engine rated at 100 horse-power about 40 seconds. You could not get the test started in 40 seconds. 24 hours is considered a standard length of time when a test is to be

made. In order to remedy the shaft being cut out of true, it would be necessary to take it to a machine-shop, put it into a lathe on these centers on which it was turned and cut down the face of the coupling. That operation itself would take about an hour in the machine-shop, not including taking the machine out, or to the machine-shop and back, but simply the facing of the coupling. In many instances that occurs very often on line shafting and many other installations of machinery and can be remedied on the spot by shimming it with a thin piece of paper, about the thickness of a newspaper. It was claimed that this coupling was one four-thousandth out; a piece of newspaper on the side would have brought it true, and it could have been run in that way for quite a while, say a month or two, until it could have been permanently fixed. It would not necessarily have to be taken to the shop. This one four-thousandth of an inch is about the thickness of a hair. [130]

**[Testimony of S. H. Head, for Defendant.]**

S. H. HEAD, called as a witness on behalf of defendant, testified:

Previous to the conversation testified to by Mr. Wernicke, I met Mr. Spalding.

Q. What passed between you and him?

Plaintiff objected to the question upon the grounds that it was incompetent and immaterial and that plaintiff could not be bound by what passed between these men and that it took place after the transaction was completed.

The Court overruled the objections, to which rul-

(Testimony of S. H. Head.)

ing plaintiff noted an exception.

**Exception No. 5.**

(The witness answered:) A. Colonel Spalding asked me to get the elevators running; that was his one object, to get the elevators running; it required more electric power at the switchboard than we were giving. We had another engine there—it was set up. Colonel Spalding said, “Get another generator on to this one and that will give me enough power to run the elevators for the time being.”

I tried to get another generator, but I could not. The Westinghouse people did not have theirs there. Then Colonel Spalding suggested that I go to the General Electric; I went to the General Electric, but they did not have one, either a 75 or a 50. When we found that out the colonel said, “Well, it is impossible to get the power, and I must have it; the only thing for me to do is to contract with the electric company and have the juice brought in to me.” Then he said, “I will cancel your contract now and you must take your things out.”

That was preceding the conversation with Mr. Wernickie. I then told Mr. Wernickie about it, and I told him that the way they had held off the work there it had forced Colonel Spalding [131] to cancel the contract on us and that the machinery was there, and it belonged to them, and I wanted them to cancel their contract with us, but he would not do it.

Then I went and talked to Colonel Spalding and he sent me to his attorneys in Portland, and after I

(Testimony of S. H. Head.)

talked with them and explained the situation to them they wrote a letter to the Westinghouse people, which is the letter of September 6th. That entire transaction took place on the same date. The conversation with Mr. Wernickie was in the basement, and that with Mr. Spalding in his office upstairs in the same building. Colonel Spalding gave as a reason for abrogating the contract *was* that he had to get the elevators running; that it was very important, and time was absolutely of the essence of it. We did not have enough power in the first unit to run those elevators and he wanted me to get another generator to run in connection with it, and it was impossible to obtain that other generator, therefore Colonel Spalding canceled the contract and told me to take my machinery out and he would get power put into the building. That second generator was to be run by the second engine that was installed. We had two engines installed there, but we did not have the second generator.

I wrote to Wernickie that it was because of the insufficiency of the generator that we lost our contract with Colonel Spalding. I had to get 75 kilowatts; with the first unit, I could not get it; with the second I could; if I had a sufficiency of generators I could have gotten enough to keep those elevators running.

The second engine we installed was 100 horsepower; the same as the first.

My letter of August 4th contained also this statement: [132]



“This would make it appear that both you and we are going to be delayed somewhat in our work. Yet, as we have already shipped the second engine and presume that you people have shipped the second generator, the second unit should be installed very shortly, and we have no doubt Colonel Spalding will allow testing out of each plant as if completed, so that the expected payment will not be delayed much beyond the stated time.”

The subject matter to which the “give and take” in the letter of August 9th refers, was as follows: The generator came without a shaft or a bed-plate; I assumed, knowing nothing about the electrical end of it, which Mr. Wernicke was to furnish, that a shaft had to be put into the generator to run it, and you had to put a bed-plate underneath it; that is, the builders of the generator had to. Then it came up after we got to work, that we had to supply a very expensive gas regulator, which we had not figured on, and I pointed out the fact that we had bought the gas regulator for our work, because it belonged to us, and it was simply up to them to supply what belonged to their generators. That was the “give and take” that I referred to. In other words, we were to accommodate ourselves to the circumstances as we found them. [133]

The following letters were introduced in evidence as having been written by the Samson Iron Works and received by the Westinghouse Electric & Manufacturing Company:

**Exhibit [Letter, August 12, 1910, Samson Iron Works to Westinghouse E. & Mfg. Co.].**

Aug. 12, 1910.

Westinghouse Electric & Mfg. Co.,  
#165 Second St.,  
San Francisco, Cal  
Spalding Bldg.

Gentlemen:—

Attention Mr. Irwin.

We have just received word from our engineer at Portland informing us that as near as he can get at it, you will not have either of your Generators in Portland before another 60 days has elapsed. Is it possible that such a thing as this can be? We would deem it a favor if your Financial Department could, under the circumstances, kindly go into the matter very fully and let us hear from you, for the probability is that we will be held by Col. Spalding under pretty heavy damages for non-fulfillment of our contract, supposing, of course, that this report from Portland is true.

Yours very truly.

**SAMSON IRON WORKS.**

By —————.

**Exhibit [Letter, August 15, 1910, A. M. Irwin to  
Samson Iron Works].**

San Francisco, Cal. 8—15—10.

Samson Iron Works,

Stockton, Cal.

Gentlemen:—

Att. Mr. S. H. Head.

**SUBJECT: SPALDING BLDG.**

We have yours of Aug. 12th, with regard to shipments under contract in connection with your Spalding Bldg. job, and would state that we have no advice here to the effect that there will be a delay, nor have we any advice as to when shipment will be made.

We are, however, to-day taking the matter up with our Portland house with a view of assisting and promptly advising you.

We ask your indulgence for a short time.

Very truly yours,

A. M. IRWIN,

MK.

Ass't. to Treasurer.

**Exhibit [Letter, August 15, 1910, Samson Iron  
Works to Westinghouse E. & Mfg. Co.].**

Aug. 15, 1910.

Westinghouse Electric & Mfg. Co.,

2d & Natoma Sts.,

San Francisco, Cal.

Attention Financial Dept.

Gentlemen:

We still await to hear from you a correct report on when [134] you will be able to ship the Gene-

rators to the Spalding Bldg., Portland.

We have just received a letter from our engineer in Portland saying that the first Generator is anything but a success at the present time and that your Company put a wooden bedplate underneath it, causing it to rock when in motion. We have wired our representatives, the Industrial Engineering Co. of Portland to send us a complete report of this plant and would request that you wire to your Mr. Wernicke and have him make you a definite statement about how your men are performing the work.

It would appear from our man's report that he is working against all kinds of inconveniences and annoyances in a petty way. This may possibly be attributed to the fact that Samson Iron Works together with every other manufacturer on this coast, San Francisco excepted, refuse to either recognize or treat with classes of men banded together in some secret organization to disrupt and hamper trade on this coast, calling themselves labor unions.

As this plant is of great importance not only to ourselves but to you in that it is the first attempt to use Gas Engines for elevator and electric lighting service on this Coast, we would be much obliged if you will give this matter your personal attention.

Yours very truly,

SAMSON IRON WORKS.

By ———.

**Exhibit [Letter, September 8, 1910, Westinghouse  
E. & Mfg. Co. to Samson Iron Works].**

Portland, Oregon, 9—8—10.

Samson Iron Works,  
Stockton,  
California.

Gentlemen:—

Attention Mr. S. H. Head.

Subject: SPALDING BUILDING.

We desire to acknowledge receipt of your Mr. S. H. Head's communication dated September 6th, 1910, relative to generating outfit for the Spalding Building, and for your information would advise that this matter is being referred to the proper officials of this company.

Yours very truly,

WESTINGHOUSE ELECTRIC & MFG. CO.

GEO. R. SAILOR.

Stamped: Received

Sept. 10. 1910.

S.H.H. 10.

**Exhibit [Letter, September 10, 1910, Samson Iron  
Works to Westinghouse E. & Mfg. Co.].**

Sept. 10, 1910.

Westinghouse Electric & Mfg. Co.,

Couch Bldg., Portland, Ore.

Gentlemen.

Subject: SPALDING BLDG.

We are in receipt of your favor of the 8th of Sept. acknowledging the official communication of our



Mr. Head on behalf of Samson Iron Works informing you that Col. Spalding had refused acceptance of the plant for this Building and that you had forwarded this letter to the proper officials of your Company, for which we thank you.

Yours very truly,

SAMSON IRON WORKS.

By ————— [135]

**Exhibit [Letter, September 12, 1910, Samson Iron Works to Westinghouse E. & Mfg. Co.].**

Sept. 12, 1910.

Westinghouse Electric & Mfg. Co.,

Couch Bldg., Portland, Ore.

Gentlemen:

As we have already informed you, Col. Spalding rejected the installation of the Electric Lighting Plant in the Spalding Building and we would say that your Generator, together with the appurtenances therefor, now in the basement of the Spalding Bldg., are awaiting your removal. We may needlessly add that we will have no further use for the Generators ordered from you at this time.

Thanking you, we are,

Yours very truly,

SAMSON IRON WORKS.

By —————.

**[Testimony of W. M. Berry, for Plaintiff.]**

W. M. BERRY, called as a witness on behalf of plaintiff in rebuttal testified:

The average value of the B.T.U. furnished by the Portland Gas & Coke Company to its consumers,

180 *Westinghouse Electric & Manufacturing Co.*  
is 579 B.T.U's., between August 20, 1910, to September 12, 1910.

The foregoing constitutes all the parts of the evidence offered and received in said cause material for the consideration of the exceptions indicated, and assignments of error. [136]

**[Instructions of the Court to the Jury.]**

The Court instructed the jury as follows:

The COURT.—(Orally) Gentlemen, give me your attention now for a few moments:

This is an action by plaintiff to recover for the alleged breach of a contract between it and the defendant under which plaintiff was to furnish and defendant receive and pay for three electric generators, with their connections and attachments, as described in and in accordance with the terms of the contract which has been read and explained to you, to be installed in the Spaulding Building, at Portland, Oregon, on foundations in the basement of that building to be prepared for their reception.

The complaint proceeds upon the theory in substance that plaintiff was ready, able, and willing to furnish, deliver, and erect on its foundations and to have in operation on the date called for in the contract the first of said generators, but that by reason of the fact that the necessary foundation was not in readiness for such installation plaintiff was prevented from erecting the apparatus and having the same in operation by said date, but did erect the same as soon as the foundation was ready for its installation and defendant had furnished proper means for its operation; and that it was in all re-

spects ready and able to deliver the two other generators and the permanent switchboard called for by the contract in accordance with its terms, but that defendant not only failed to accept and pay for the first, but notified plaintiff that it would not receive the other apparatus nor proceed further under the contract, and that thereby defendant has been guilty of a breach of contract, to the plaintiff's damage in the sum of \$3,100, which amount it sues to recover.

[137]

The theory of the defense is that the plaintiff failed to fulfill the contract on its part in that although the said building was in all respects in readiness for the installation of the first generator called for under the contract plaintiff failed and neglected to furnish the first of said generators with the necessary appliances and parts or to install the same of the capacity or within the time called for by the contract, and further failed to deliver the other generators and apparatus within the specified time, and that thereby the defendant lost and was compelled to abandon its contract with the owner of said building to install said electrical apparatus, to the damage of the defendant, which it alleges by way of counter claim, in the sum of \$7,693.34.

The contract in suit provides that the plaintiff is to furnish, deliver, and erect on foundations to be provided in the basement of the Spaulding Building, and to connect up and have in operation by July 1st, 1910, the first seventy-five kilowatt generator and a temporary switchboard. As the contract is to be constructed however, notwithstanding this pro-

vision as to time, plaintiff was not required to install said generator and switchboard and have it in operation until the foundations and other construction called for were in such state of completion in the building that plaintiff could proceed with the erection and installation of such apparatus. Upon such completion and readiness however it was the duty of plaintiff to proceed with all due despatch and make the installation of such apparatus. Moreover, the generator called for by the contract it appears was an engine-type generator, and it was contemplated by the contract that the generator, together with the gas engine, should constitute a unit of the installation. If, therefore, you find that according to proper practice and [138] engineering methods in the installation of such units the gas engine to be provided by defendant should have been erected on its foundation and installed with its necessary appliances before the generator could be properly installed and put in operation, upon which question evidence has been submitted to you, then plaintiff was not required to install said first generator before such time as it could be connected with the gas engine when installed by defendant, and thus put in operation.

If you find that plaintiff furnished the first generator and temporary switchboard at the time and of the capacity and quality called for by the contract, and as soon as the foundations and other construction required were in a condition of readiness, erected and installed them and put the same in operation, it did all it was required to do as to



that unit; and if you further find that within the time specified in the contract plaintiff was ready and able to deliver the two other generators and apparatus called for by the contract, including the permanent switchboard, but that before the time specified for such delivery defendant distinctly and absolutely refused to perform the contract, then plaintiff was at liberty to consider the contract as broken by defendant and at an end and to desist from further effort on its part to perform the same; and could then sue for damages as for a breach.

On the other hand, should you find that the foundation and other construction for the installation called for by the contract were in readiness in time to enable plaintiff to install with reasonable diligence and put in operation its generator within due time under the contract, but that the failure to have such installation completed and in operation within such time arose from plaintiff's failure or neglect to [139] deliver or erect the same complete, or was because of the defective or insufficient character of the machine, then defendant was entitled to reject it and repudiate the contract and the plaintiff cannot recover, but would itself be guilty of a breach of the contract.

In this connection it is claimed by the defendant that proper bed-plates upon which to install such generators as are here involved are an essential feature of the installation to be furnished by the builder of the generator apparatus; the plaintiff, on the other hand, claiming that proper construction and engineering methods as understood in that



business require such bed-plates to be furnished by the party installing the engine feature of the unit. The contract in this instance is silent upon this subject, but evidence has been introduced tending to show the custom prevailing in that respect. In this regard, if you find that it was the duty of plaintiff to furnish a proper bed-plate for the first generator, and that the failure to have that structure installed and in successful operation within the required time was in whole or in part by reason of plaintiff's neglect to furnish such bed-plate, then plaintiff was in default in the performance of its contract and defendant was justified in refusing to go on with it, and the plaintiff cannot recover.

Again, in connection with the defense, it is provided in the contract that delivery of the other two generators specified will be made from the factory in approximately ninety days from date of receipt of orders therefor. This word "approximately" means within a reasonable limit of a few days; that is, its effect is to give a reasonable extension of time for performance beyond the ninety days' limit, to be estimated and [140] determined under all the circumstances. The defendant claims that an order to deliver these generators was sent to the plaintiff on or prior to May 31st, 1910. If you find such to be the fact, those generators should have been delivered on or about August 31st following. There is evidence tending to show that on September 12th the defendant notified the plaintiff company that they would have no further use for those two generators, and that the one already delivered

awaited removal by the plaintiff. Up to that time there had been no delivery of the two generators referred to, and if you find that this delay was an unreasonable one, as not warranted by the time specified in the contract, then plaintiff was in default in that respect and the defendant was justified in refusing to receive that part of the apparatus.

On the question of damages, should you find for the plaintiff you will understand that under the contract between the parties there was no sale of any part of the machinery therein referred to actually consummated. By the express provisions of the contract no property in or title to the apparatus or any part thereof and no right to use the same under the patents of the plaintiff, passed to the defendant, but all of said apparatus remained the personal property of the plaintiff until fully paid for. The contract in that regard provides that if default be made by the purchaser in payments stipulated for at the time specified in the contract, the seller shall be entitled to the immediate possession of said apparatus and be free to enter upon the premises where the same is located and to remove it as its property. If, therefore, you find for the plaintiff, it will not be entitled to recover for the value of the apparatus installed by plaintiff [141] or any part thereof, since it remains its property, and there is no evidence that it has been lost or injured, but it will only be entitled to recover such damages as it has sustained in its endeavor to carry out the contract, such as the expense of the delivery and

installation thereof, and the necessary steps to have it returned to it, together with such profit as it would have realized on its sale had the contract been fully executed.

Further, in this connection, it is in evidence that the two generators that were not shipped were subsequently sold by plaintiff. As to those machines, therefore, if you find that they were sold for as much as plaintiff would have realized for them under the contract, the plaintiff can be allowed nothing for the failure of defendant to accept them.

It also appears that after the contract had been abandoned the plaintiff dismantled the switchboard called for by its terms and distributed its available parts back to its stock. Therefore should your verdict be for the plaintiff it will be entitled, as to this appliance, only to the difference between the value to the plaintiff of its parts and the value of the switchboard as a completed article, together with any profit over its cost which would have been realized had the contract been carried out. But you will bear in mind that the different pieces of machinery called for by the contract were not being sold piece-meal. The contract fixes a gross sum as the consideration to be paid for all the apparatus to be furnished by plaintiff thereunder, and therefore, should you find for plaintiff, it will be entitled to a verdict only for the difference between that gross sum and the value to it of the property left on its hands, to be arrived at in the way I have indicated, [142] to which should be added the expense it would have been to in installing the apparatus not

delivered had the contract been carried out, which expense the contract provides is to be borne by the plaintiff. In other words, as this gross price included the cost value of the goods sold, the cost of delivering and installing them and the profit plaintiff was to make on the contract, the difference between that gross price and the value of the property left on plaintiff's hands, plus the installation expense of the part not delivered represents plaintiff's loss in the transaction, if you find that it is entitled to recover.

Therefore, should your verdict be for the plaintiff, you will award it damages in such amount as will compensate it for the loss suffered by it within the limitations I have suggested, not exceeding, however, the amount demanded in the complaint.

As heretofore indicated, the defendant, in addition to its answer filed in this action, has set up a counterclaim asking damages for the breach of the contract on the part of the plaintiff in the amount I have heretofore stated, based upon its theory that the failure of the contract arose out of plaintiff's default in the particulars heretofore stated and has submitted evidence as to the loss suffered by it. Should you find, therefore, that the plaintiff failed to keep its contract and that the defendant has suffered damage thereby, you will award it such damages as you may find from the evidence it has suffered as the proximate result of plaintiff's breach, but not beyond a just compensation for its loss, nor in excess of the amount demanded.

Should you find in favor of the defendant but that it has not been damaged then your verdict should be



simply one in favor of defendant but without awarding it damages. [143]

Now, gentlemen of the jury, those are all the specific instructions with reference to the law of this case, but there are some general considerations that the Court should suggest to you.

The facts in the case are solely within the province of the jury to determine; the Court has nothing to do with the facts excepting to regulate the admission of evidence to establish them. It rests with you to say what the facts are from the evidence. You do that by considering the evidence, watching it as it goes in and giving it the benefit of the application of your judgment and wisdom as men of experience in business in determining what that evidence shows and from that you deduce the facts.

In this case much the larger portion of the evidence has been introduced by way of and in the shape of depositions. Depositions are presented in the form of written statements; and while you have not the advantage of the appearance upon the witness-stand of living witnesses, which is an element of exceeding value in determining the degree of credibility that will be accorded to the particular evidence, the law contemplates that evidence may be submitted by deposition. You must judge of it just as the Court would have to do, to the very best of your ability, applying to it your judgment and reason in saying how far the evidence of any particular witness thus submitted is reasonable in its nature, how far it comports with other evidence in the case which you are inclined to believe and thus you make



up your mind as to what the facts are.

Also there has been introduced a large volume of correspondence between the parties. That is evidence in the case for your consideration. The contract in this case provides that it cannot in any wise be varied as to its terms by anything [144] in the correspondence or transactions between the parties thereafter had; and of course you are not to consider any of this correspondence as bearing upon any change in the terms of the contract because the law does not admit of that, but you are permitted to consider it for any purpose as to which it tends to throw light on every question submitted to you as a question of fact and from which to determine the issue as to which one of these parties was guilty of culpability which resulted in the failure to carry out this contract.

And really that is the whole sum and substance of this case, one or the other of these two parties failed to come up to the requirements of their contract; as to which one the evidence is more or less conflicting, and that is the question which you are to determine. The party that failed to keep its contract, which failure resulted in loss to the other, is under the law to be mulct in damages. That is the whole sum and substance of this case, Who was responsible for the failure to have this contract carried out?

I should suggest to you that in the Federal Court the verdict of the jury must be unanimous; you cannot render a verdict by a less number than by the entire twelve, as you may under the state practice.

The clerk will have prepared forms of verdict which you will find to meet your necessities under the instructions I have given you.

When you have reached a verdict you may report it.

No other instructions were given.

Mr. LEVY.—We take an exception to the instruction concerning [145] the delay, and the matter of default; substantially instruction No. 4, containing the statement in regard to the letter of September 12th, and when the order was entered into for the generators, subject to being delivered. Also the instruction as to the question of the conditional sale, wherein your Honor read from the contract, and your Honor's conclusions therefrom. And the instruction as to the measure of damages concerning the failure of the defendant to receive the second and third generators, and the fact that they had a market value.

An exception to the failure to give the instruction requested in regard to the provision of the contract concerning conditional sale; and the instruction we asked in regard to damages wherein we made a computation in accordance with the manner in which we asked for it.

#### **Exception No. 6. [146]**

##### **[Instructions Offered by Plaintiff and Refused.]**

The following were the instructions offered by plaintiff which the Court refused to give to the jury:

“It is in evidence that this order was mailed from the Portland office after having been taken to Port-

land from San Francisco. It was signed by defendant's manager on May 26th; it was sent from Portland May 31 by mail. Therefore it could not have been received at the factory any earlier than June 4th.

"On August 3, 1910, plaintiff sent an invoice to defendant in the amount of \$1,500. Defendant did not pay the same, but wrote offering an excuse for its failure. Plaintiff wrote again to defendant on August 8th, 1910, requesting payment; still defendant did not comply. Another request was made on August 24th.

"On August 25, 1910, defendant wrote a letter to plaintiff, received presumably on the following day, in which defendant stated as follows: 'We beg to notify you that we have not and will not under any circumstances accept your generator nor any part of your machinery until you have conclusively proven to us that you have done the work specified in your contract with us which is that you are to supply a generator together with all necessary electrical equipment to deliver 75 Kw.'s in one instance and 100 Kw.'s in another instance to a switchboard when direct connected to our engine, and we further notify you that inasmuch as you have violated your contract with us, that same is void and of no effect.'

"On August 25, 1910, the first unit was operated and the required electrical power could not be developed. At a later test made of the gas engine of the defendant delivered only a maximum of 78.5 h. p.,

while there is evidence that to develop 75 Kw. in a generator such as required by this contract, a machine developing between 100 and 125 h. p. would be necessary. [147] Between the 25th of August and the 2d of September, 1910, the defendant was ordered by the owner of the Spaulding Building to take its apparatus out of the building.

“The contract contains a provision that all previous communications between the parties, either verbal or written, with reference to the subject matters of the contract are abrogated by the contract, and that the proposal, duly accepted and approved, constitutes the agreement between the parties. You are therefore instructed to disregard all such previous communications and assertions therein with reference thereto.

“If for the reasons I have outlined as the basis therefor, you shall conclude that the plaintiff is entitled to your verdict, the measure of damage is as follows:

“The contract price for the entire installation is \$7,850.00 From this you shall subtract the sum of the following items:

1. The market value at Portland, Oregon, in September, 1910, of the second and third generators, if you find that they had such market value;
2. If you find that the permanent switchboard had no market value as such, but only as comprising articles which when dismantled could be replaced in stock, the value of the component parts of the switchboard at said time;
3. The freight charge at said time upon the



switchboard from East Pittsburg, Pennsylvania, to Portland, Oregon, had it been shipped; and

4. The cost at that time of labor and material necessary to erect and install said second and third generators, permanent switchboard and other apparatus. [148]

“The balance is the amount of damages suffered by the plaintiff. Whether or not plaintiff received more than the cost of building the second and third generators at a sale to another party is utterly immaterial.

“If, therefore, as stated, your verdict shall be for the plaintiff and you shall find that the market value at Portland, Oregon, in September, 1910, of the second and third generators was \$2,827.10; that the permanent switchboard had no market value, but only a value as comprising articles which when dismantled could be replaced in stock and that the value of the component parts of the switchboard at that time was \$1,267.83; that the freight at said time upon said switchboard, had it been shipped from East Pittsburgh, Pennsylvania, to Portland, Oregon, would have been \$100.80; and that the cost at that time of labor and material necessary to erect said second and third generators and permanent switchboard was \$400.00; then the amount of your verdict for the plaintiff shall be \$3,254.27.

“The contract provides that the title to the property to be delivered and installed thereunder should remain in the plaintiff until all the payments provided for in the contract were made. But so far as this case is concerned, the insertion of this provi-



sion in the contract gave the defendant no more or greater rights than if it had been omitted and should, therefore, be wholly disregarded by you in rendering your verdict."

~~Attach to the foregoing bill of exceptions the original exhibits offered and received in evidence.~~ [149]

On November 20, 1914, within the time extended therefor by stipulations of counsel and orders of Court, plaintiff served upon defendant the proposed . . . ~~Attach to the foregoing bill of exceptions the original~~ bill of exceptions herein. Thereafter on April 12, 12, 1915, plaintiff's petition for a new trial herein was argued, submitted and denied. Thereafter on May 18, 1915, defendant, within the time extended by stipulations of counsel and orders of Court, served upon plaintiff its proposed amendments to said proposed bill of exceptions. Thereafter on May 21, 1915, said proposed bill of exceptions and proposed amendments thereto were delivered to the clerk of the said District Court. Thereafter the District Judge who tried said cause specified September 11, 1915, as the date upon which he would hear the matter of the settlement of the said bill of exceptions, and on said date said matter was continued until such time as said bill of exceptions should be engrossed.

**[Order Settling Bill of Exceptions, and Stipulation Therefor.]**

The foregoing Bill of Exceptions is hereby settled as above engrossed this 8th day of October, 1915.

WM. C. VAN FLEET,  
District Judge.

The foregoing bill of exceptions, including pages 26bb through 26bbbbb, is correct, and may be settled as engrossed.

DAVID L. LEVY,  
CAMPBELL, WEAVER, SHELTON &  
LEVY,

Attorneys for Plaintiff.  
NATHAN H. FRANK.  
Attorneys for Defendant.

[Endorsed]: Filed Oct. 8, 1915. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [150]

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*In the District Court of the United States in and  
for the Northern District of California, Division  
Two.*

No. 15,366.

WESTINGHOUSE ELECTRIC & MANUFACTURING COMPANY, a Corporation,  
Plaintiff,

vs.

SAMSON IRON WORKS, a Corporation,  
Defendant.

**Praecipe [for Transcript of Record].**

To the Clerk of the Above-entitled Court:

You are hereby requested to include in the record on writ of error in said cause the following papers:

1. Amended complaint.
2. Answer to amended complaint and counterclaim.
- 2a. Amendment to answer and counterclaim.
3. Cross-complaint.

4. Answer to cross-complaint.
5. Plaintiff's amended bill of items.
6. Plaintiff's amendment to amended bill of items.
7. Plaintiff's demand for a bill of particulars of the account mentioned in the cross-complaint.
8. Defendant's bill of particulars of said account.
9. Verdict.
10. Order continuing cause for term made June 18, 1914.
11. Petition for writ of error.
12. Assignment of errors.
13. Order allowing writ of error and supersedeas.
14. Bond on writ of error.
15. Citation on writ of error and affidavit of service. [151]
16. Writ of error.
17. Order made January 8, 1915, extending return day.
18. Order made January 23, 1915, extending return day.
19. Stipulation made January 28, 1915, extending return day.
20. Bill of exceptions.

DAVID L. LEVY,  
CAMPBELL, WEAVER, SHELTON &  
LEVY,

Attorneys for Plaintiff.

[Endorsed]: Filed Oct. 8, 1915. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [152]

**[Certificate of Clerk U. S. District Court to  
Transcript of Record.]**

*In the District Court of the United States, in and  
for the Northern District of California, Second  
Division.*

No. 15,366.

WESTINGHOUSE ELECTRIC & MANUFACTURING COMPANY, a Corporation,  
Plaintiff,

vs.

SAMSON IRON WORKS, a Corporation,  
Defendant.

I, Walter B. Maling, Clerk of the District Court of the United States, in and for the Northern District of California, do hereby certify that the foregoing one hundred fifty-two (152) pages, numbered from 1 to 152, inclusive, to be a full, true and correct copy of the record and proceedings in the above-entitled cause, in conformity with the praecipe for record filed herein as the same remains of record and on file in the office of the clerk of said court, and that the same constitute the return to the annexed writ of error.

I further certify that the cost of the foregoing return to writ of error is \$106.40; that said amount was paid by David L. Levy, Esq., one of the attorneys for the plaintiff, and that the original writ of error and citation issued in said cause are hereto annexed.

IN TESTIMONY WHEREOF, I have hereunto

[Ten Cent Internal Revenue Stamp Canceled  
Nov. 4, 1915. W. B. M.] [153]

UNITED STATES OF AMERICA,—ss.

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between Westinghouse Electric & Manufacturing Company, a corporation, Plaintiff in Error, and Samson Iron Works, a Corporation, Defendant in Error, a manifest error hath happened, to the great damage of the said Westinghouse Electric & Manufacturing Company, a Corporation, Plaintiff in Error, as by its complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States



Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco, in the State of California, within thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable EDWARD D. WHITE,  
Chief Justice of the United States, the 9th day of  
December, in the year of our Lord one thousand  
nine hundred and fourteen.

[Seal] WALTER B. MALING,  
Clerk of the United States District Court for the  
Northern District of California.

By J. A. Schaertzer,  
Deputy Clerk.

Allowed by WM. C. VAN FLEET,  
U. S. Dist. Judge. [154]

The answer of the Judges of the District Court of the United States, in and for the Northern District of California. The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said Court, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned at the day and place within contained, in a certain schedule to this writ annexed as within we are commanded.

[Seal]                      WALTER B. MALING,  
Clerk.

[Endorsed]: No. 15,366. United States District Court for the Northern District of California, Division Two. Westinghouse Electric & Manufacturing Company, a Corporation, Plaintiff in Error, vs. Samson Iron Works, a corporation, Defendant in Error. Writ of Error. Filed Dec. 15, 1914. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

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**[Citation on Writ of Error (Original)].**

UNITED STATES of AMERICA,—ss:

The President of the United States, to Samson Iron Works, a corporation, Nathan H. Frank, and Irving H. Frank, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to a writ of error duly issued and now on file in the clerk's office of the United States District Court for the Northern District of California wherein Westinghouse Electric & Manufacturing Company, a Corporation, is plaintiff in error, and Samson Iron Works, a Corporation, is defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable WILLIAM C. VAN FLEET, United States District Judge for the Nor-

thern District of California this 9th day of December, A. D. 1914.

WM. C. VAN FLEET,

United States District Judge. [155]

Service of the within citation is hereby admitted for defendant, Samson Iron Works, a corporation, and its attorneys on this 10th day of December, 1914.

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United States of America,

City and County of San Francisco,—ss:

On this 15th day of December, in the year of our Lord one thousand nine hundred and fourteen, personally appeared before me, Eugene W. Levy, Notary Public, the subscriber, R. W. Kearney appears and makes oath that he delivered a true copy of the within citation and also of the petitions for writ of error, assignment of errors, order allowing writ of error, bond thereon, and writ of error herein to Nathan H. Frank, attorney for Samson Iron Works.

R. W. KEARNEY.

Subscribed and sworn to before me at San Francisco, this 15th day of December, A. D. 1914.

E. W. LEVY,

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: No. 15,366. United States District Court for the Northern District of California. Westinghouse E. & M. Co., Plaintiff in Error, vs. Samson Iron Works, Defendant in Error. Citation on Writ of Error. Filed Dec. 15, 1914. W. B. Malting, Clerk. By J. A. Schaertzer, Deputy Clerk.

[Endorsed]: No. 2674. United States Circuit Court of Appeals for the Ninth Circuit. Westinghouse Electric & Manufacturing Company a Corporation, Plaintiff in Error, vs. Samson Iron Works, a Corporation, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Northern District of California, Second Division.

Filed November 4, 1915.

F. D. MONCKTON,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Meredith Sawyer,  
Deputy Clerk.

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*United States Circuit of Appeals for the Ninth  
Circuit.*

WESTINGHOUSE ELECTRIC & MANUFACTURING COMPANY, a Corporation,  
Plaintiff in Error,  
vs.

SAMSON IRON WORKS, a Corporation,  
Defendant in Error.

**Order Extending Time to [January 26, 1915, to] File  
Record on Writ of Error and to Docket the  
Cause.**

Good cause appearing therefor, it is Ordered that the plaintiff in error may have to and including the 26th day of January, A. D. 1915, within which to file the record on writ of error and to docket the cause

in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated January 7, 1915.

WM. C. VAN FLEET,  
United States District Judge. [156]

No. ——. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to — to File Record Thereof and to Docket Case. Filed Jan. 7, 1915. F. D. Monckton, Clerk.

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*In the District Court of the United States in and for the Northern District of California, Division Two.*

No. 15,366.

WESTINGHOUSE ELECTRIC & MANUFACTURING COMPANY, a Corporation,  
Plaintiff,

vs.

SAMSON IRON WORKS, a Corporation,  
Defendant.

**Order [Allowing Plaintiff to February 7, 1915, to Make Return on Citation on Writ of Error].**

Good cause appearing therefor, it is hereby ORDERED: that plaintiff may have to and including the 7th day of February, 1915, within which to make return on the citation on writ of error heretofore issued in the above-entitled matter.

Dated this 8th day of January, 1915.

WM. C. VAN FLEET,  
Judge.



[Endorsed]: No. 15,366. In the District Court of the United States in and for the Northern District of California. Westinghouse Electric & Manufacturing Company, a Corporation, Plaintiff, vs. Samson Iron Works, a Corporation, Defendant. Order. Filed Jan. 8, 1915. F. D. Monckton, Clerk.

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*United States Circuit Court of Appeals for the  
Ninth Circuit.*

WESTINGHOUSE ELECTRIC & MANUFACTURING COMPANY, a Corporation,  
Plaintiff in Error,  
vs.

SAMSON IRON WORKS, a Corporation,  
Defendant in Error.

**Order Extending Time to [November 4, 1915, to]  
File Record on Writ of Error, Etc.**

It appearing from the representations of the clerk of the District Court of the United States for the Northern District of California that he was unable to prepare the record on writ of error within the time allowed by the stipulation and order filed September 7, 1915, it is ordered that the plaintiff in error may have to and including November 4, 1915, within which to file its record on writ of error and to docket the cause in the United States Circuit Court of Appeals for the Ninth Circuit.

WM. C. VAN FLEET,  
District Judge.

Dated October 27, 1915.

[Endorsed]: No. ——. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to Nov. 4, 1915, to File Record Thereof and to Docket Case. Filed Oct. 27, 1915. F. D. Monckton, Clerk.

No. 2674. United States Circuit Court of Appeals for the Ninth Circuit. Three Orders Under Rule 16 Enlarging Time to November 4, 1915, to File Record Thereof and to Docket Case. Refiled Nov. 4, 1915. F. D. Monckton, Clerk.



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No. 2674

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

WESTINGHOUSE ELECTRIC & MANUFACTURING  
COMPANY (a corporation),

*Plaintiff in Error,*

VS.

SAMSON IRON WORKS (a corporation),

*Defendant in Error.*

## OPENING BRIEF OF PLAINTIFF IN ERROR.

DAVID L. LEVY,

WALTER SHELTON,

CAMPBELL, WEAVER, SHELTON & LEVY,

*Attorneys for Plaintiff in Error.*

*Filed this*.....*day of March, 1916*

*FRANK D. MONCKTON, Clerk.*

*By*.....*Deputy Clerk.*



No. 2674

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

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WESTINGHOUSE ELECTRIC & MANUFACTURING  
COMPANY (a corporation),

*Plaintiff in Error,*

VS.

SAMSON IRON WORKS (a corporation),

*Defendant in Error.*

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## OPENING BRIEF OF PLAINTIFF IN ERROR.

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### 1. Statement of the Case.

This case comes to this court upon a writ of error after verdict and judgment in the District Court in favor of the defendant in an action by Westinghouse Electric & Manufacturing Company for breach of a contract for the sale and installation of three generators and necessary equipment.

The Samson Iron Works had undertaken the installation in the Spalding building (then under construction) of the electrical power plant which was to consist of three units; each unit was to be composed of a generator and a gas engine.



The Iron Works thereafter entered into the agreement in suit which is in the form of a proposal made by the Westinghouse Company and accepted by the defendant at San Francisco on May 26, 1910. The contract was then taken to Portland by Wernicke, the Westinghouse representative, and from there mailed to East Pittsburgh (\*157). The letter ratifying the authority of Mr. Head, the salesman-ager of the Iron Works, to execute the contract was not received by the plaintiff until June 6, 1910.

The contract provided for the delivery and erection of the generators on foundations in the basement of the Spalding Building at Portland, Oregon. The first generator was to be shipped immediately from San Francisco, and a temporary switchboard was to be furnished with it, pending receipt of the complete switchboard from the east. The remaining two generators were to be built and sent from the Westinghouse factory at East Pittsburgh.

Concerning the time of performance as to the first generator, the contract read:

This generator with its gas engine will be considered as the first of three units which will be installed in the Spalding Building. This first unit has to be in operation by July 1st, 1910, and it is agreed and understood that payment in the amount of \$1500.00 will be made on the total contract price, immediately upon installation and acceptance, which payment will not be made later than July 15, 1910 (\*2-3).

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\* The references are to the pages of the transcript.

As to the other generators, it was provided:

Delivery of the second 75 K.W. generator and the 100 K.W. generator will be made from our factory in approximately 90 days from date of receipt of order, with full and complete information (\*3).

The first generator reached the Spalding building at Portland approximately June 15, 1910 (\*157). The erecting engineer of the Westinghouse Company was N. P. Wilson, whose office was in Seattle. He was first called to the job at Portland in July (\*157, 125), devoting from the 9th to the 17th of that month to the installation of the temporary switchboard and to preparatory work with the cables which were part of the equipment.

In this period of the installation the shaft, which was furnished by the Iron Works for the first unit, was being manufactured at Portland under the supervision of Mr. Mitchell, the defendant's representative (\*125-6). The shaft is the element connecting the engine with the generator. In erecting a unit of this kind the engine is set up, the armature, or rotating element of the generator, is next rigidly mounted on the shaft, and then the frame, or stationary part of the generator, which is vertically split or divided, is fitted around the armature. It then remains but to secure the generator to the foundations and the unit is complete (\*127; 151-3). Thus by reason of the absence of the shaft (a matter for which the Iron Works was responsible), it was impossible at this time to erect the generator.

[For the aid of the court we print on the opposite page a photographic reproduction of a vertically-split, engine-type generator, connected to a gas engine and mounted upon the latter's base.]

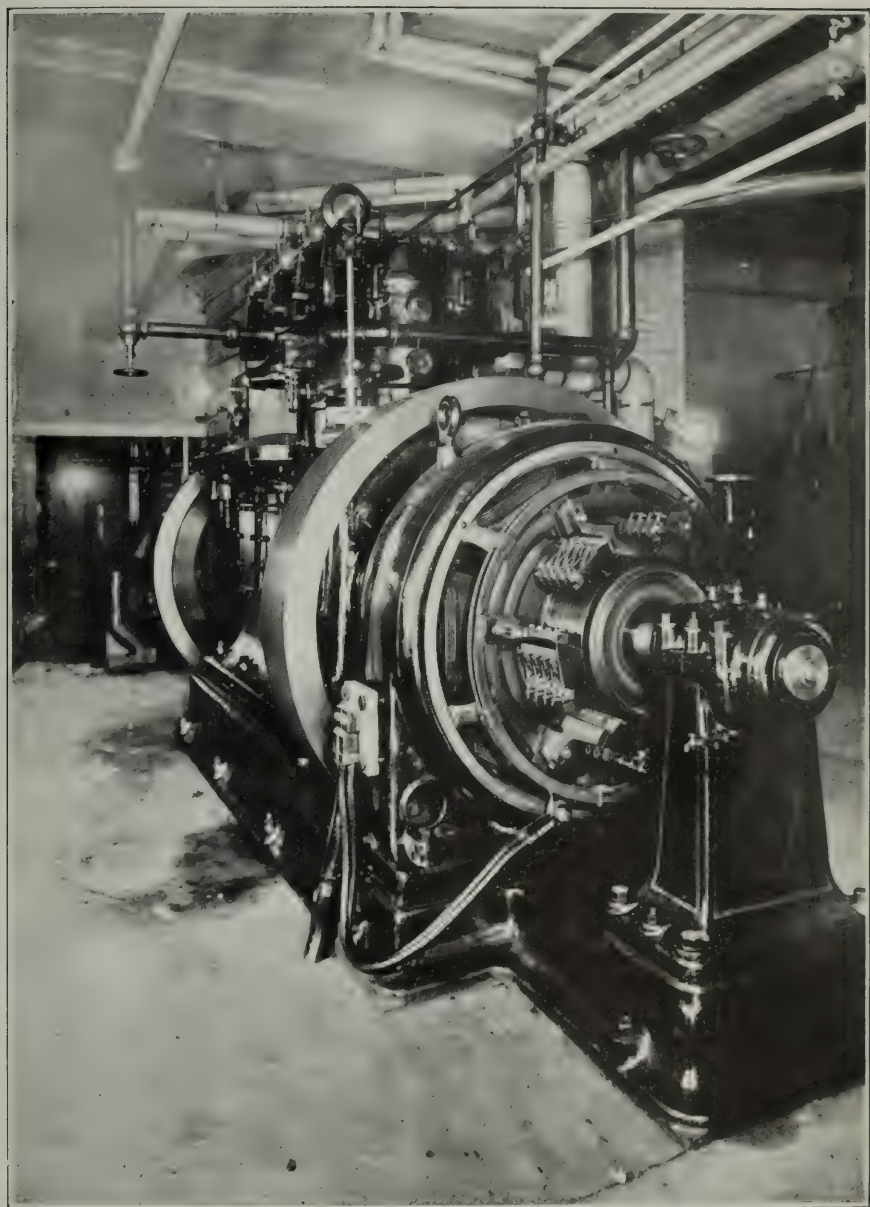
Moreover, the basement was not yet complete; the concrete floors were not laid. The first gas engine was in the basement but not on its foundation (\*125-6). Here, then, was another reason why the generator could not be erected; in this respect the owner of the building was in default. Under well-settled principles each of these factors excused prompt installation by the Westinghouse Company; performance was in fact physically impossible. Conceding, then, that the clause in the contract:

This generator with its gas engine will be considered as the first of three units which will be installed in the Spalding Building. This first unit has to be in operation by July 1st, 1910  
\* \* \* (\*2)

means that the Westinghouse Company was to have the generator installed by that time, its failure to do so was not a breach on its part under the circumstances. The trial judge so instructed the jury (\*181-2).

On July 17th, before leaving the job, Wilson inquired of Mitchell concerning the prospect of proceeding with the installation. Mitchell replied that he did not know, that he had no idea when the shaft would be ready (\*126-7).

In the meantime Wernicke at Portland kept in touch with the job and again called Wilson from







Seattle on July 26 (\*157; 127). The building foundations were in but Mitchell was still working with the gas engine, getting it ready for installation. Wilson, nevertheless, temporarily erected the generator on a heavy wooden sole-plate. But it was impossible to operate the generator because the Iron Works had not yet connected up the piping through which the gas was to be conducted to the engine (\*128-9). There being no fuel, the engine could not be operated, and thus another delay was caused. In this also the Westinghouse Company was, of course, entirely clear of fault. Wilson remained on the job this time until the 1st of August. Before he left he asked Mitchell when the gas piping would be put in ready to run. Mitchell replied that he did not know (\*128).

Meanwhile the first payment under the contract had fallen due. The parties had agreed that \$1500 was to be paid upon installation of the first unit, which was to be complete by July 1, 1910; but, apparently contemplating just such a delay as occurred it was provided that this payment should be made not later than July 15, 1910 (\*2, 3).

On August 3, 1910, the Westinghouse Company addressed a letter to the Iron Works inclosing an invoice in the amount of \$1500, stating that this sum had fallen due under the contract and requesting payment thereof (\*133). This was acknowledged by Mr. Head for the Iron Works (\*133-5), who wrote that the invoice was receiving his attention. Then follows in the letter an obvious endeavor to avoid or

postpone this payment; first, on the ground that the oral understanding between the parties on the subject had been different from the written agreement, and second, upon the ground that the Westinghouse Company had not finished its work. We quote from the letter:

Three or four days ago we received a letter from our installing engineer in which he said that his work was complete and that he could not do anything further because the electricians had not finished their end and this we presume to be your company. Yesterday we received another letter from him from which we understand that the work is now complete and that they propose to run the first plant for 24 hours *but can not use it any further for a month or two as the building will not be complete.*

The last clause italicized is material in the light of future developments. The net purport of the letter, however, is the effort of the Iron Works to avoid complying with the contract as to this payment, and to induce the Westinghouse Company to wait until the former should receive an installment under its general contract with the owner of the building. The suggestion that the Westinghouse Company was delaying the installation was apparently based upon alleged hearsay. The uncontradicted proof in the case completely refutes the assertion. In response, the Westinghouse Company wrote to the Iron Works on August 8, 1910, insisting upon adherence to the contract and again asking payment (\*135-6).

In answer the Iron Works wrote on August 9, 1910, suggesting that in a transaction of the kind in-

volved there should be a "certain amount of give and take," and again attempting to evade the obligation to pay (\*137-8).

The defendant followed this with another letter to the plaintiff dated August 12, 1910, stating that the defendant's engineer at Portland had informed them that the remaining generators would not reach Portland until sixty days thereafter, and asking for a full explanation (\*175). That this was merely another effort to evade payment and not a complaint in good faith for non-performance is plain from the fact that it was addressed, not to Portland nor to those in charge of the installation for the plaintiff, but to San Francisco, and to Mr. Irwin, of the Treasury Department, whose only function in the matter had been to conduct the correspondence concerning the matured partial payment. Furthermore, the attitude expressed in this letter is utterly irreconcilable with the statement of the defendant eight days before that the first plant could not be used "any further for a month or two as the building will not be complete." Mr. Irwin answered August 15, 1910 (\*176), stating that he had no advice on the subject and that he was presenting the matter to the Portland representative.

This letter was crossed by another of the same date from the Iron Works referring again to the second and third generators, and stating further:

We have just received a letter from our engineer in Portland saying that the first generator is anything but a success at the present

time and that your company put a wooden bed-plate underneath it, causing it to rock when in motion. We have wired our representatives, the Industrial Engineering Company, of Portland, to send us a complete report of this plant and would request that you wire to your Mr. Wernicke and have him make you a definite statement about how your men are performing the work (\*176-7).

This also was addressed to Mr. Irwin, who replied that the difficulty was not due to any fault in the plaintiff's apparatus but rather in the coupling and shaft furnished by the Iron Works; further that this had been conclusively proved to the latter's representative. Demand was again made for the payment which had fallen due.

Let us now return to the job at Portland to ascertain what had developed during this interchange of correspondence.

Wilson was called again to Portland on August 15th. The engine was now ready to be run. The unit was therefore connected up and when operated was found to vibrate considerably. To demonstrate the cause of this vibration a pin gauge was erected by rigidly fastening a pin near the shaft. By revolving the machine and taking measurements at intervals in the circuit, the distance between the stationary pin and the shaft at different positions was found to vary. This proved that the shaft was out of true. Mitchell, of the Iron Works, accordingly had the shaft taken to a machine shop to be trued up (\*128-9).



Pending this operation the Westinghouse representative determined, in the interests of a permanent installation, to substitute a cast-iron sole-plate for the wooden one upon which the generator had been erected. This was accordingly done (\*129).

From the foregoing it is plain that the complaint of the Iron Works that the wooden plate caused the vibration, based as it was upon hearsay, was entirely unfounded.

But for another and an independent reason the temporary use of the wooden sole-plate is not material to the question of plaintiff's performance of the contract. It was proved without contradiction that in the case of an engine-type generator of the size involved here the engine-builder furnishes an extended bedplate with the engine to which the generator is subsequently bolted. A bedplate is not a part of the generator. This was established not only by the testimony of the plaintiff's employees but also by that of A. M. Hunt, an engineer of national reputation (\*152-3). Upon cross-examination by defendant's attorney, he explained that the issue had been settled in 1901 by a committee appointed by the American Society of Mechanical Engineers. Up to that time there had been frequent misunderstandings upon the subject since the use of direct-connected generators had come into vogue a short time before. The standard was then established that the engine-builder should furnish the joint bedplate, and this practice has been followed generally throughout the country (\*155-6). The photographic reproduc-



tion shown above discloses a generator mounted in the customary manner—upon the engine base. Moreover, the contract provides in detail the apparatus which the plaintiff was to furnish, and there is no mention of a bedplate or sole-plate.

When Wernicke, the plaintiff's representative, first saw the defendant's drawings for the installation he noticed that the defendant had not planned an extended base upon which to mount the generator (\*157-8). He called the defendant's attention to this in a letter and offered to furnish three plates at \$35 each, to be billed independent of the contract (\*159-60). In answer to this the defendant wrote criticizing the charge, suggesting the idea of "give and take," and complaining of the provision in the contract for the partial payment (\*162-4).

The shaft was returned from the machine shop and Wilson next called to the job on August 25th. In the meantime the metal sole-plate had been installed and the generator erected again. Mitchell and Wilson, assisted by Heber, plaintiff's mechanic, tested the set, measuring the load or development of electrical power by means of a water rheostat. The maximum load was found to be about 50 kilowatts. When that point was reached "the engine laid down." Mitchell then used gasoline instead of gas, but still the engine did no better. The test showed the generator to be in first-class condition. The commutation was perfect and would have been the same under an increased load (\*129-31). The output of

the unit should have been 75 kilowatts. It was thus obvious that the Iron Works could not, with the apparatus on hand, develop that amount of power. That the fault lay with the engine was absolutely demonstrated at the trial.

But before proceeding to that subject it is well to note the action of the defendant when it realized its inability to perform the contract with the owner of the building because of the insufficiency of its engine.

Upon the very day of the test it repudiated the contract with the plaintiff, seeking to throw the blame upon the Westinghouse Company. A letter dated August 25 (\*139-41) was written to the plaintiff at its San Francisco office, signed by the sales-manager, alleging categorically various items in connection with the installation of the first generator in which plaintiff was said to be in default, and concluding as follows:

Providing you fulfilled certain conditions which were that you should have your generator installed for our acceptance on July 1st, then we should pay you \$1500.00 immediately upon installation and acceptance, which payment will not be made later than July 15th. Another provision in the contract you agree to have both the other units in Portland in ninety days from May 25th. We haven't so much as heard these generators have been shipped from Pittsburgh, a direct violation of your contract with us.

It is true that the coupling between the generator and the engine was 4/1000 inch out of true, an accident liable to occur in the very best regulated factories, and one which could have

been remedied within a couple of days had we been able to find out whether your generator would successfully operate or not; therefore, it is impossible for you to think that we delayed your work in any way.

We beg to notify you that we have not and will not under any circumstances accept your generator nor any other part of your machinery until you have conclusively proved to us that you have done the work specified in your contract with us, which is that you are to supply a generator together with all necessary electrical equipment to deliver 75 KWs in one instance and 100 KWs in another instance to a switch-board when direct connected to our engine, and we further notify you that inasmuch as you have violated your contract with us, the same is void and of no effect.

These efforts to construe the contract are, of course, entitled to no weight. The admission that the engine shaft had been out of true is significant. The repudiation of the contract by the Iron Works is of the highest importance in determining the legal status of the parties.

Upon receipt at the plaintiff's factory of word that the defendant had repudiated the contract, the second and third generators which had been completed and were ready for shipment, were held there. Subsequently they were sold elsewhere (\*146).

Having failed to furnish the necessary power, the Iron Works was directed by the owner to remove its apparatus from the Spalding Building (\*150-1). F. W. Winn, the superintendent of all the buildings (with one exception) owned by Colonel Spalding in

Portland, testified that the sole cause of directing the Iron Works to remove its machines was the failure of its engine to develop the required horsepower (\*151). Shortly thereafter, on the 1st or 2nd of September, Mr. Head, defendant's salesmanager, so notified Wernicke and asked on what terms the plaintiff would release the Iron Works (\*159). Thereupon Wernicke telegraphed the plaintiff's factory to hold all shipments (\*164).

Mr. Head, testifying for the defendant, stated that on September 6th Colonel Spalding suggested to him that a second generator be obtained and connected up with the defendant's second gas engine, and from the two units sufficient power would be procured. Mr. Head stated further that the plaintiff's second generator was not there, that he could not obtain one from the General Electric Company, and thereupon Colonel Spalding cancelled his contract with the defendant. Mr. Head testified also that he then advised Wernicke that the way the plaintiff "had held off the work" had forced the cancellation and that he desired that the agreement between the parties here should be rescinded. Upon Wernicke's refusal, Mr. Head consulted attorneys and had a letter to the plaintiff prepared by them (\*172-3). The body of that letter was as follows:

You are hereby notified that the Spalding Company has refused to accept the power plant being installed in the Spalding building by us. We had a contract with you to furnish generators to us which would develop a certain capacity and a certain efficiency. The first generator



furnished by you was not sufficient in any way and, on account of the delay in furnishing the generator by you and the insufficiency of the first generator, we have lost the contract of installing the plant in the Spalding building, all of which we consider to be due to the failure on the part of your company to carry out its contract, and this is to notify you that we shall hold you responsible for all loss and damage to us on account of the loss of this contract (\*165).

It but remains to analyze the testimony concerning the relative merits of the gas engine and the generator of which the first unit was composed. The statement of Wilson that the generator showed perfect commutation and operation has already been mentioned (\*130-1). The measure of plaintiff's obligation as to the performance of this generator is contained in the contract, and is based upon the approximate efficiency and temperature of the machine (\*39). The sole function of a generator is to convert mechanical energy applied to it into electrical power. The quality of a generator thus depends on the amount of energy which is lost during its operation by friction and in heat—the less the loss the better the generator. The ability of the machine to deliver in electrical form the energy applied to it is called its efficiency. The test-sheet of the generator was produced, and two engineers testified that it showed that the machine's performance was better than the contract provided as to both efficiency and temperature (\*148-50).

Moreover, in explanation of the fact that upon the test of the unit the rated capacity of the generator



was not delivered, it was conclusively shown that the fault lay with the defendant's gas engine.

The scientific equation between mechanical and electrical energy is: 1 kilowatt = 1-1/3 horsepower. It follows that 75 KW. = 100 HP. This means that if 100 HP. of mechanical energy is applied to a generator of perfect efficiency 75 KW. in electrical energy will be produced. Of course, no electrical machine is perfectly efficient. Thus in order to develop 75 KW. there must be additional mechanical energy to take care of the heat and friction losses. In practice approximately 110 HP. must be developed by a gas engine in order properly to drive the first generator involved here (see testimony of A. M. Hunt, \*153).

Subsequent to the fiasco in the Spalding Building Mr. Mitchell, the defendant's representative, procured a test to be made of the gas engine which was a part of the first unit installed. The test was made September 10, 1910, by B. C. Ball, a mechanical engineer of Portland, in the presence of Mitchell and two other mechanics, all of whom corroborated Ball's measurements and observations. *The maximum horsepower developed by the engine was 78.5.* Mr. Ball himself testified for the plaintiff concerning this test, and his report to the Iron Works was introduced in evidence. He stated further that Mitchell remarked at the time that he knew the engine could not develop the amount of power required (\*141-5). Thus by defendant's own action it was

conclusively established that the failure of the first unit was the fault of its gas engine.

The foregoing statement of facts does not reflect a partisan view of the record. It is a fair presentation of the uncontradicted evidence by which the jury were necessarily bound in their deliberations and decision. The source of the statement lies indiscriminately in the testimony offered by both parties. And it is particularly significant that not only is the evidence concerning the installation at Portland confirmed in many respects by defendant's conduct and correspondence, but the defendant did not seek to question the accuracy of the narrative, although its representative, Mitchell, was in court and available.

In view of the facts analyzed above, it is plain that the plaintiff lived up to its duty under the contract at all times until defendant's conduct—both by breach and repudiation—relieved the plaintiff from any further obligation to perform. The evidence shows a scrupulous effort on the part of plaintiff at all times to fulfill its obligations under the agreement notwithstanding it was beset at every turn by obstacles for which it was in no way responsible. These more than trebled the expense which should properly have been incurred in the installation but plaintiff made no complaint on that score. It held steadfast to its purpose undeterred by the difficulties in its way due to the delay of others, the faulty apparatus furnished by the defendant, and the latter's ignorance of the requirements of the job which was an admitted experiment (\*177). The

plaintiff's representatives were plainly actuated by a zealous desire that a thoroughly satisfactory job should be accomplished. One would have thought that the plaintiff's contract price and not the defendant's depended upon the success of the installation—that the plaintiff instead of the defendant was to derive therefrom the enormous profit involved (\*170). On the other hand, when the plaintiff long after its maturity asked for the partial payment to which it was entitled, it was met by complaints and criticism so clearly unfounded in fact and made in such evident bad faith that it would have been justified morally and legally in refusing to go on. Instead, the plaintiff persisted in its work until the first unit was installed and operated and it became plain that due to the insufficiency of its gas-engine the defendant must fail.

Therefore, in reading this record on writ of error one would confidently expect to find in explanation of the verdict for the defendant a palpable misapplication of the evidence or a radical misdirection of the jury. The ground upon which the plaintiff relies for a reversal of the judgment does not require this Court to hold that the jury had no alternative but to find that the defendant was at fault and the plaintiff was not. But the certainty with which the evidence points to that conclusion is of importance in disclosing the extreme prejudice which the plaintiff suffered by reason of the erroneous position taken by the trial judge in charging the jury upon the question of damages. This is the

principal contention which will be argued in this brief.

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## **2. The Instructions of the Trial Court upon the Plaintiff's Measure of Damages were Prejudicially Erroneous.**

The contract between the parties involved the delivery of three generators. The first was installed in the Spalding Building. The other two were not delivered but were sold elsewhere after the defendant repudiated the contract. Concerning the first generator the jury were charged:

On the question of damages, should you find for the plaintiff you will understand that under the contract between the parties there was no sale of any part of the machinery therein referred to actually consummated. By the express provisions of the contract no property in or title to the apparatus or any part thereof and no right to use the same under the patents of the plaintiff, passed to the defendant, but all of said apparatus remained the personal property of the plaintiff until fully paid for. The contract in that regard provides that if default be made by the purchaser in payments stipulated for at the time specified in the contract, the seller shall be entitled to the immediate possession of said apparatus and be free to enter upon the premises where the same is located and to remove it as its property. If, therefore, you find for the plaintiff, it will not be entitled to recover for the value of the apparatus installed by plaintiff or any part thereof, since it remains its property, and there is no evidence that it has been lost or injured, but it will only be entitled to recover such damages as it has sustained in



its endeavor to carry out the contract, such as the expense of the delivery and installation thereof, and the necessary steps to have it returned to it \* \* \* (\*184-5).

An instruction upon this subject was requested by the plaintiff and refused as follows:

The contract provides that the title to the property to be delivered and installed thereunder should remain in the plaintiff until all the payments provided for in the contract were made. But so far as this case is concerned, the insertion of this provision in the contract gave the defendant no more or greater rights than if it had been omitted and should, therefore, be wholly disregarded by you in rendering your verdict (\*193-4).

Upon the subject of the second and third generators, the court charged:

Further, in this connection, it is in evidence that the two generators that were not shipped were subsequently sold by plaintiff. As to those machines, therefore, if you find that they were sold for as much as plaintiff would have realized for them under the contract, the plaintiff can be allowed nothing for the failure of defendant to accept them (\*186).

The court refused to give the following instructions requested by the plaintiff:

If for the reasons I have outlined as the basis therefor, you shall conclude that the plaintiff is entitled to your verdict, the measure of damages is as follows:

The contract price for the entire installation is \$7850.00. From this you shall subtract the sum of the following items:



1. The market value at Portland, Oregon, in September, 1910, of the second and third generators if you find that they had such market value.

2. If you find that the permanent switchboard had no market value as such, but only as comprising articles which when dismantled could be replaced in stock, the value of the component parts of the switchboard at said time;

3. The freight charge at said time upon the switchboard from East Pittsburgh, Pennsylvania, to Portland, Oregon, had it been shipped; and

4. The cost at that time of labor and material necessary to erect and install said second and third generators, permanent switchboard and other apparatus.

The balance is the amount of damages suffered by the plaintiff. Whether or not plaintiff received more than the cost of building the second and third generators at a sale to another party is utterly immaterial (\*192-3).

The issue is thus squarely presented. Under the instructions of the court it was entirely competent for the jury to conclude that the plaintiff had failed to prove any damages. In fact the jury were told that as to the generators—constituting the principal factors of the contract—the plaintiff could have no recovery notwithstanding defendant's breach. It is, of course, fundamental that an appellate court can not speculate upon the grounds which underlay the verdict. No one can say in what manner or by what process of reasoning they reached their conclusions. They are necessarily presumed to have followed the

instructions of the trial judge and if they were erroneous, the judgment must be reversed unless it appears beyond all doubt that the error did not and could not have prejudiced the rights of the complaining party.

In the case at bar, the jury may have decided that the plaintiff was entitled to damages only on the basis of the first generator delivered and installed. They were told that the plaintiff could recover nothing on this account. If that instruction was erroneous, its prejudicial effect is plain. Plaintiff, adhering to its conception of the measure of damages, offered no evidence upon the theory stated by the court—such as expense of installation or removal. The same applies equally to the charge concerning the other generators. The court had stated the law to be that the plaintiff could not recover the price nor value of the first generator; this was followed by the direction that if the others were sold for as much as they would have brought under the contract (and there was no evidence that they were not), it followed that “the plaintiff can be allowed nothing for the failure of defendant to accept them.” The jury were thus enjoined from giving the plaintiff a verdict upon the principal factors of its case—the verdict for the defendant was under the circumstances the natural result.

Moreover, the defendant had interposed a counterclaim (\*30-2). Damages were asked because of the plaintiff’s alleged breach of the contract. Detailed proof was made of the loss suffered (\*168-70). It

may be that under the instructions as to the measure of damages governing the respective parties, the jury found them both in some degree of fault and, deciding that the scale was evenly balanced, gave the verdict to the defendant.

These considerations disclose the important role played by the charge of the trial judge upon this subject. If it was an open question under the facts whether the plaintiff or defendant was in default, any error in the charge is fatal to the judgment. To the demonstration of that error the following sections of this brief will be devoted.

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### **3. The Reservation of Title in Plaintiff did not Restrict it to Repossession of the First Generator upon Defendant's Breach.**

The contract provided:

The property in and title to the apparatus \* \* \* shall not pass from the company until all payments hereunder \* \* \* shall have been fully made in cash, and the apparatus herein specified shall remain the personal property of the company, whatever may be the mode of its attachment to the realty or other property, until fully paid for in cash, and the purchaser agrees to perform all acts which may be necessary to perfect and assure retention of title to the said apparatus to the company. If default is made in any of the payments in the manner and form and at the time herein specified the company shall be entitled to the immediate possession of said apparatus and shall be free to enter the premises where such apparatus may

be located and remove the same as its property (\*17).

This is the usual form of sale with reservation of title, generally called a conditional sale. That this provision is one for the benefit of the seller and that upon the purchaser's failure to pay the price, the former may either enforce his right to resume possession or waive it and proceed as in a case of an absolute sale, is clearly and definitely settled in the law. The seller is put to his election; the choice of one remedy is an abandonment of the other. Accordingly, an action upon the contract for the price of the article is held to vest title in the purchaser. There is an unqualified unanimity of authority upon this point. We select as illustrations a few cases from various jurisdictions, including that where the contract was negotiated and that in which it was to be performed.

In *The Parke etc. Co. v. White River etc. Co.*, 101 Cal. 37, the court, in construing a contract of conditional sale, held:

If the money had been paid as agreed, the title would have passed to defendants, and the money not being paid as agreed, the plaintiff could either recover the property or sue for the purchase price. But the pursuit of one remedy necessarily excluded the other. It was not entitled both to the purchase price and the property, and an action brought to recover the purchase price, as was done in this case, is a ratification of the sale (pp. 40-1).

In *Herring-Hall-Marvin Co. v. Smith*, 72 Pac. 704 (Ore.), the court, speaking through District Judge Wolverton, then a member of the State court, held:

The common, and perhaps the most natural, remedy of the seller upon default, is to declare the buyer's right under the contract forfeited, and take proceedings to recover the property. But this is not the only remedy. Where a party has agreed to purchase and pay for the property, and has or is entitled to possession until default, the seller may have choice of one of four distinct remedies, among which he may waive a return of the property, treat the contract as executed on his part, and recover from the buyer the agreed price (p. 706).

In *Shepard v. Mills*, 50 N. E. 709 (Ill.), it was held:

It is said, however, that the contract provided that the title to the heating apparatus should not pass, but should remain in appellees until the contract price should have been fully paid, and that in default of payment appellees had the right reserved by contract to take possession, and remove the apparatus from the building; and the argument is that, as there was default in payment of one-half of the contract price, there was no delivery, the title did not pass, and therefore there could be no recovery except for a breach of the contract properly alleged in a special count. We do not agree to this view of the case. The provision in question was for the benefit of appellees to secure the payment of the purchase money, and they had the clear right to waive it—to treat the title as having passed—and rely on their action at law to recover the balance, if any, due them. \* \* \* This provision of the contract was for the benefit of the appellees alone, and it was waived by bringing



this action in a form which treated the contract as having been fully performed, and the title of the heating apparatus as having passed to appellant (p. 710).

Again, in *Osborne & Co. v. Walther*, 69 Pac. 953 (Okla.), the court held:

It is true, by the terms of the notes the title to the machine was not to pass to Walther until the notes were paid, but this was a condition for the benefit of the plaintiff, and might be waived by it. By its election to sue on the notes for the purchase price of the machine, it waived this clause in the notes, and title passed to the defendant (p. 955).

In *Kilmer v. Moneyweight Scale Co.*, 76 N. E. 271 (Ind.), it was held:

The retention of the legal title by the seller could not prevent his recovery by suit of the agreed price according to the terms of the contract of conditional sale. The right to take back the property was a right reserved by the seller for his own benefit, to be exercised at his option. The buyers had no right to return the goods or to complain of the seller for not taking them back (p. 272).

The idea of election of remedy by the seller in the case of a conditional sale is expressed by the United States Supreme Court in *Van Winkle v. Crowell*, 146 U. S. 42:

The assertion of that lien treated the property as the property of Belser and Parker, and did so after the notes of December 11, 1885, were taken. It was inconsistent with the existence in the plaintiffs of a title to the property. It treated the sale of the property

to Belser and Parker as unconditional (pp. 50-1).

To quote from decisions elsewhere would serve no purpose other than unduly to extend the length of this brief.

It is plain, therefore, that the trial court should have charged, as requested by the plaintiff, that the reservation of title should be ignored.

The same error was implicit in the instruction given upon this subject. The jury were told that the plaintiff could not recover the value of the apparatus delivered and installed, but only the expense of installation and removal. No evidence had been offered on this theory. Here, then, was a misconception of the legal effect of the clause reserving title. This the plaintiff could waive. The commencement of this action constituted plaintiff's election. Upon such waiver the rule of damages ordinarily controlling in the case of a breach of a contract of sale became applicable. Under the facts here the plaintiff could recover either the reasonable value of what it has delivered and installed, or the contract price with proper deductions on account of those particulars in which the contract remained to be performed at the time of defendant's repudiation. The complaint was framed so as to present both theories. The first count pleaded partial performance of the contract by the plaintiff, readiness and ability to perform completely, and defendant's failure to pay and repudia-

tion. The second count was in *indebitatus assumpsit* for the value of the materials furnished. Proof of the latter was made through the witness Wernicke (\*157). The evidence upon the measure of plaintiff's recovery on the contract was complete. Upon this score, also, the trial judge committed error in giving and refusing instructions. This will be treated in the succeeding section.

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#### **4. The Law Concerning the Plaintiff's Measure of Damages was Incorrectly Presented to the Jury.**

The agreement in suit was entire and provided for the payment of a single price for complete performance by the plaintiff. The evidence showed that at the time of the defendant's repudiation the apparatus which had not yet been delivered was complete and ready for shipment. In such a case the vendor is entitled to recover the contract price less the value of the parts undelivered and the expenses of delivery and installation thereof which the repudiation rendered unnecessary to be incurred.

The instructions asked by the plaintiff (\*192-3) presented this rule clearly and succinctly. The trial judge conceded the accuracy of the plaintiff's statement of the measure of damages. He presented it to the jury in substance but with one material qualification. He directed them to deduct from the contract price the value of all "the property left on the plaintiff's hands". This, under a previ-

ous instruction, necessarily included the first generator. The charge reads:

But you will bear in mind that the different pieces of machinery called for by the contract were not being sold piece-meal. The contract fixes a gross sum as the consideration to be paid for all the apparatus to be furnished by plaintiff thereunder, and therefore, should you find for plaintiff, it will be entitled to a verdict only for the difference between that gross sum and the value to it of the property left on its hands, to be arrived at in the way I have indicated, to which should be added the expense it would have been to in installing the apparatus not delivered had the contract been carried out, which expense the contract provides is to be borne by the plaintiff (\*186-7).

Thus, the court's view concerning the reservation-of-title clause was again responsible for serious error.

Moreover, the instruction just quoted was preceded by that concerning the effect of the sale by the plaintiff of the second and third generators. The jury were told:

If you find that they were sold for as much as plaintiff would have realized for them under the contract, the plaintiff can be allowed nothing for the failure of defendant to accept them (\*186).

Since the contract was entire, there was no method of determining what the plaintiff could have realized for any part of the apparatus under the contract. Thus in making the fact of the sale of these generators a means of denying the plaintiff any

recovery in that behalf, the instructions became conflicting and hopelessly confusing.

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## **5. The Evidence Shows Without Conflict that the Plaintiff Performed the Contract.**

Thus far the instructions have been considered upon the theory that it was an open question for the jury whether the plaintiff or defendant was guilty of a breach of contract. The prejudicial effect of the errors above discussed is all the more manifest in the light of the facts of the case from which the only rational conclusion was that the defendant alone was at fault.

The defense presented simple issues: first, the sufficiency of the first generator; second, the time of plaintiff's performance.

As to the first, the testimony has been analyzed earlier in this brief (see pages 14 to 16). No other conclusion was possible but that the generator fulfilled the requirements of the contract and that the failure of the unit was due to the defendant's gas-engine.

Concerning the time of delivery and installation of the first generator, the delays were proved without conflict to have been due to causes for which the plaintiff was not responsible. First were the absence of the shaft, which was being manufactured for the defendant, and the incomplete condition of the basement of the Spalding Building (\*125-6).



The next delay was due to the failure of fuel; the gas piping to the engine had been connected (\*128-9). This was approximately August first. On the fifteenth the unit was operated. This was complete performance by the plaintiff as to the first generator unless the vibration which immediately developed was due to the fault of the plaintiff. The contention of the Iron Works that the wooden base upon which the generator had been erected was responsible for the vibration, had no more substantial form than as a self-serving declaration in Mr. Head's letter to the plaintiff, confessedly based upon hearsay. The suggestion was doubly refuted: first by the demonstration that the engine shaft was out of true and Mr. Mitchell's admission by conduct in having it corrected (\*128-9) and second by the fact that it was no part of the plaintiff's duty to furnish a base. The general engineering practice and the terms of the contract coincide in the proof that the plaintiff sold a generator and not the foundations upon which to mount it (\*155-6).

Thus, in so far as the first generator was concerned, the plaintiff had lived up to every requirement of the contract—completing its obligation in that behalf on August fifteenth. The operation of the unit on the twenty-fifth and the subsequent test of the engine but served to confirm the contention of the plaintiff that it was in no respect at fault.

The remaining question was whether the plaintiff was guilty of a breach of contract in failing to deliver the second and third generators within time.

It is elementary that the party to a contract who commits the first breach is responsible to the other for its non-performance.

As Justice Brewer, speaking for the United States Supreme Court, said:

When a contract is not performed the party who is guilty of the first breach is the one upon whom rests all the liability for the non-performance.

*Anvil Mining Co. v. Humble*, 153 U. S. 540, 52.

See also

*National Surety Co. v. Long*, 125 Fed. 887 (C. C. A.).

The doctrine of anticipatory breach is also well settled in the Supreme Court. In *Roehm v. Horst*, 178 U. S. 1, it was held:

After the renunciation of a continuing agreement by one party, the other party is at liberty to consider himself absolved from any future performance of it, retaining his right to sue for any damages he has suffered from the breach of it (Syl.).

Tested by this rule, the repudiation by the defendant by its letter of August 25, 1910, entitled the plaintiff to consider the contract as broken and to desist from further effort to perform. At that

time the plaintiff was clearly not in default. The contract provided for the delivery "from our factory in approximately 90 days from date of receipt of order, with full and complete information" (\*3). The proposal was accepted by the Iron Works May 26, 1910 (\*89), and the contract was taken by Wernicke to Portland and thence mailed to Pittsburgh (\*157). There is no specific testimony of the date of its receipt at the factory, so the court may judicially conclude that the contract arrived there about June 1st. The 90-day period expired August 30, 1910. That time was not of the essence follows necessarily from the latitude permitted by the use of the word "approximately". Long prior to the maturity of this requirement of the contract, and at a time when the plaintiff was acting well within its obligations thereunder, the defendant was guilty of repudiation.

Moreover, the defendant's repudiation dispensed with the necessity of proof by the plaintiff that it was able to complete performance. The sole effect of inability in this respect would be to deprive the plaintiff from recovery of damages in so far as the second and third generators were concerned, but it would not affect the right of the plaintiff to sue for the defendant's breach of the contract and to recover upon the score of the first generator which was delivered, either by way of damages or for its reasonable value.

*Gray v. Smith*, 83 Fed. 824, 828 (C. C. A. 9th Cir.).

See also

*Lowe v. Harwood*, 139 Mass. 133.

It follows, therefore, that on August 25th the contract was at an end and the plaintiff's cause of action thereon accrued.

Furthermore, the defendant had been guilty of a substantial breach of the contract by its failure to pay the sum of \$1500 on July 15th, 1910. In *Phillips Construction Co. v. Seymour*, 91 U. S. 646, the complaint was criticised by counsel for the defendants because of a defective attempt on the part of plaintiffs to plead readiness and ability to perform, but the Supreme Court held:

We are inclined to think, that, coupled with the allegation that defendant was in default for non-payment for work actually done, this was sufficient. It is not like a case where a plaintiff has done nothing, but is required to put a defendant in default by offering to perform, or showing a readiness to perform. Plaintiffs here had already performed, and the defendant failed to do its corresponding duty under the contract; and, defendant having defaulted on a payment due, plaintiffs are not required to go on at the hazard of further loss (p. 649).

In *Creswell Co. v. Martindale*, 63 Fed. 84 (C. C. A. 8th Cir.), the court, speaking through Judge Sanborn, held:

The established rights and remedies for the breach of an agreement are as effectually contracted for as the performance of the acts stipulated. One of the rights of the vendor under this contract was to refuse to perform

subsequent acts stipulated after the vendees had refused to perform a substantial part of the contract on their part. This right is given by the law for his protection to the party to a contract against whom the first breach has been committed. No sound reason occurs to us why its existence should be made dependent on the good faith or belief of him who first breaks the contract. On the other hand, there are cogent reasons to the contrary (p. 87).

\* \* \* \* \*

Our conclusion is that the right of a party to a continuing contract to refuse to make subsequent performance on his part, after the other contracting party has refused, upon full notice and demand, to perform a substantial part of the contract on his part, is not dependent on the good faith of the latter, nor on his belief that he is not violating the contract, but rests solely upon the fact whether or not he has violated or failed to perform a substantial part of the contract that the agreement required him to perform (p. 88).

In *Raabe v. Squier*, 42 N. E. 516 (N. Y.), the plaintiffs had been denied recovery because of their refusal to continue the delivery of materials contracted for. In reversing the judgment the Court of Appeals held:

It is true that the last batch of material was not delivered until December, but we are told that the delay in delivering was because of the nonpayment of the amount due on former deliveries. The refusing to deliver an installment until a former installment had been paid for was not a breach of the contract on the part of plaintiffs (p. 518).



See also

*Hull Coal Co. v. Empire Coal Co.*, 113 Fed.  
256 (C. C. A. 4th Cir.), and  
*Robson v. Bohn*, 7 N. W. 357 (Minn.).

It is unnecessary to determine here whether the failure of the defendant to make the payment which fell due would have entitled the plaintiff to consider the contract at an end. It suffices that under the authorities cited, while the defendant persisted in its breach, the plaintiff was under no duty to "hazard further loss" by continuing performance and whether there was a failure on its part to deliver the second and third generators at the time provided became immaterial.

But the evidence shows nothing to have occurred subsequent to August twenty-fifth which militates in any way against the plaintiff's right of action. Wernicke's recital of his conversation with Head on September second discloses an effort by the defendant to buy its peace. Head did not deny the interview nor the fatal admission against his company which his statement connoted. This was freely made; the stress of the moment when these affairs were in process would naturally shut out all inclination to distort the facts. The conversation serves to confirm the plaintiff's position here.

Mr. Head testified that at a subsequent conversation on September sixth he complained to Wernicke that the delay of the plaintiff was responsible for the loss of the contract with Colonel Spalding, and

asked Wernicke to cancel the agreement in suit, but Wernicke refused. Head's self-serving statement could not, of course, alter the facts nor disturb the legal consequences which had accrued.

Over the plaintiff's objection, Head was permitted to testify to a conversation with Colonel Spalding on the same day at which no representative of the plaintiff was present. Spalding is said to have directed Head to procure another generator to be operated with the defendant's second gas-engine and thus produce from the two units sufficient power to answer his needs.

This was pure hearsay and incompetent.

*Young v. Godbe*, 15 Wall. 562;

*National Association v. Shryock*, 73 Fed. 774  
(C. C. A. 8th Cir.).

Moreover, the status of the transaction between the parties here had theretofore been definitely fixed. Advised by the defendant's repudiation and subsequent proposal of settlement, the plaintiff had desisted from further effort to perform. The testimony thus admitted was immaterial. It put before the jury the dilemma in which the defendant had fallen, and conveyed the idea that the plaintiff was in some way responsible for it. The prejudicial effect of the ruling is, therefore, plain.

The record contained other evidence which clearly demonstrated that the incident in which Colonel Spalding figured could have no logical force in the controversy. The development of seventy-five

kilowatts would have sufficed to meet the requirements of the building at that time (testimony of Winn, \*151). The second gas-engine might have had sufficient capacity to produce the full rating of the generator on hand; if not, the two gas-engines could have been connected up with the generator in the manner described by Mr. Hunt (\*156), and the combined horsepower would have been sufficient. Moreover, Mr. Winn, Colonel Spalding's superintendent, testified that the cause of directing the defendant to remove its apparatus from the building was the failure of the first engine to develop enough power and not the absence of the second or third units. Of course, the presence of this testimony in the record did not render harmless the admission of Colonel Spalding's statement. It cannot be conclusively presumed that the jury made the analysis of the evidence necessary to reach the conclusion just demonstrated. The erroneous ruling was, therefore, prejudicial to the rights of the plaintiff.

It is respectfully submitted that the judgment should be reversed.

Dated, San Francisco,

March 11, 1916.

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*Attorneys for Plaintiff in Error.*



IN THE

# United States Circuit Court of Appeals <sup>9</sup>

For the Ninth Circuit

WESTINGHOUSE ELECTRIC & MANUFACTURING  
COMPANY (a corporation),

*Plaintiff in Error,*

vs.

SAMSON IRON WORKS (a corporation),

*Defendant in Error.*

## BRIEF OF DEFENDANT IN ERROR

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Filed

APR 25 1916

F. D. Monckton

*Filed this.....day of April, 1916.*

*FRANK D. MONCKTON, Clerk.*

*By....., Deputy Clerk.*





No. 2674

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

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WESTINGHOUSE ELECTRIC & MANUFACTURING  
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*Defendant in Error.*

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## BRIEF OF DEFENDANT IN ERROR

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We consider the statement of the case in appellant's brief as faulty in many particulars. It is really not a statement of the case before this Court, but is an argumentative discussion of the facts as though they were being presented to a jury. It also, in many places, alleges that "they were proved without contradiction," in which respect appellant is mistaken. It concludes (p. 16) :

"The foregoing statement of facts does not reflect a partisan view of the record. It is a fair presentation of the uncontradicted evidence by which the jury were necessarily bound in their deliberations."

With this statement we take issue.

But for the purpose of the present argument it will be unnecessary to follow the appellant in the details of what

he calls his "Statement of the Case," as we do not think that the judgment of the Court can possibly turn upon any such questions of fact. There is sufficient conflict of evidence upon the real issues in the cause to make the verdict of the jury conclusive upon all questions of fact, even though we were to ignore the rule that the jury is not bound to believe the testimony of any particular witness, but might disregard his testimony for reasons satisfactory to themselves. They saw the witnesses, and heard the testimony, and as instructed by the lower Court,

"The appearance upon the witness stand of living witnesses \* \* \* \* is an element of exceeding value in determining the degree of credibility that will be accorded to the particular evidence." (p. 188.)

So, too, with respect to the evidence submitted by depositions. As said by the lower Court (Rec. p. 188), it was the province of the jury to pass upon it, and in so doing, to apply its "judgment and reason in saying how far the evidence of any particular witness thus submitted is reasonable in its nature, how far it comports with the other evidence in the case which (the jury) are inclined to believe and thus (to) make up (its) mind as to what the facts are."

The jury were really called upon

"To determine the issues as to which one of these parties was guilty of culpability, which resulted in the failure to carry out this contract. And really that is the whole sum and substance of this case, one or the other of these two parties failed to come up to the requirements of their contract; *as to which one the evidence is more or less conflicting*, and that is the question which you are to determine. The party that failed to keep its contract, which failure resulted in

loss to the other, is under the law to be mulct in damages. That is the whole sum and substance of the case, Who was responsible for the failure to have this contract carried out?" (p. 189.)

It will be noted from the foregoing, that the lower Court does not agree with the appellant in the idea that the evidence upon that question "is uncontradicted," but expressly states that upon that question there is more or less conflict.

The charge of the Court contains a fair statement of the case so far as the issues in the lower Court are concerned, and a reference thereto serves every purpose on this appeal in answer to what appellant offers as his statement of facts on the appeal. It will also appear in said charge, that instructions in accordance with what appellant claims to be the law relating to "anticipatory breach," (Brief, pp. 29-35) were given by the Court, in connection with a fair statement of the facts of the case to which that principle was to be applied. (Rec. pp. 181-185.)

It is our idea, however, that a statement of facts on an appeal should be an outline of the issues presented by the appeal, and it is to the issues so presented that we shall address ourselves.

## I.

**INSTRUCTIONS OF THE COURT ON THE QUESTION OF DAMAGES.**

1. IF ERROR, IT IS HARMLESS ERROR.—It will be noted that while the assignment of errors is somewhat broad, the discussion in the plaintiff's brief is principally addressed to but a single subject, namely, a criticism of the instructions of the lower Court on the question of damages. That is a question, however, to the consideration of which, it is evident from the record, the jury never arrived. Hence, it would seem that it becomes immaterial upon this appeal whether the instruction be right or wrong, because, if error, not being passed on by the jury, it is harmless.

We note the concession in appellant's brief (pp. 20-21) that,

"It is, of course, fundamental that an appellate Court cannot speculate upon the grounds which underlay the verdict. No one can say in what manner or by what process of reasoning they reached their conclusions. They are necessarily presumed to have followed the instructions of the trial judge, and if they were erroneous the judgment must be reversed unless it appears beyond all doubt that the error did not and could not have prejudiced the rights of the complaining party."

In attempting to apply this principle to its advantage on this appeal, appellant continues:

"In the case at bar, the jury may have decided that the plaintiff was entitled to damages only on the basis of the first generator delivered and installed. *They were told that the plaintiff could recover nothing on this account.* If that instruction was erroneous, its prejudicial effect is plain."

Such being the basis upon which the appellant founds his contention that the instruction, if erroneous, was preju-



dicial, we need go no further in the consideration of the subject, for the statement that "they were told that the plaintiff could recover nothing on this account" is not borne out by the record.

The jury *was not* told, as appellant assumes, that plaintiff *could recover nothing on account of the first generator*. On the contrary, the jury was told that plaintiff *could* "recover such damages as it has sustained in its endeavor to carry out the contract, such as the expense of the delivery and installation thereof, and the necessary steps to have it returned to it, together with such profit as it would have realized on its sale had the contract been fully executed." (Rec. pp. 185-86.)

The argument, therefore, that the instruction as to damages with respect to the first generator, debarred the jury from giving *any damages* on this account to plaintiff, and that hence a verdict for the defendant may have been based not upon a finding of a breach of contract by plaintiff, but upon a finding that they failed to prove any damages, necessarily falls to the ground.

This applies with equal certainty to the statement in the brief that

"Plaintiff adhering to its conception of the measure of damages, offered no evidence upon the theory stated by the Court—such as expense of installation or removal."

It certainly offered evidence of the expense of putting the cables and bed-plate in. (Rec. p. 160.) It also offered evidence of the reasonable cost of installation of the second and third generators, and the permanent switchboard. (Rec. p. 159.)

So we see that whether or no the instruction respecting damages be erroneous, it still left sufficient room for a verdict for the plaintiff in case it was otherwise entitled to recover. By the instruction the jury were not "enjoined from giving the plaintiff a verdict," but it only limited the amount of such verdict.

So far as the counter claim is concerned, that is an entirely different matter, because, as is admitted by the appellant, before that could enter into the consideration of the jury, *they must have found the appellant in fault.* In the language of appellant,

"It may be that under the instructions as to the measure of damages governing the respective parties, the jury found them both in some degree of fault," etc. (Brief, pp. 21-22.)

Having found the plaintiff in fault, the question of its right to recover damages is eliminated, and hence an instruction upon the question of damages, if erroneous, is nevertheless immaterial.

We think, therefore, the preliminary suggestions in plaintiff's brief by means of which he desires to establish that the alleged error in the instruction regarding the damages, would not be harmless error, has no foundation.

2. THE INSTRUCTION WAS NOT ERRONEOUS. PLAINTIFF ELECTED TO RETAIN TITLE TO THE GOODS, NOT ONLY BY THE FORM OF HIS ACTION, BUT ALSO BY HIS ACTS LONG BEFORE THE ACTION WAS BROUGHT.

As a matter of fact the instruction was not wrong as applied to the case attempted to be made by the plaintiff.

In its criticism of the instruction, the plaintiff wrests the particular language criticised from the rest of the instructions, and from the rest of the case, and attempts to apply to it legal rules applicable to an entirely different state of facts.

The instruction complained of refers to the provision of the contract by which title to the generators was retained by the plaintiff, and begins as follows:

“On the question of damages, should you find for the plaintiff you will understand that under the contract between the parties there was no sale of any part of the machinery therein referred to *actually consummated*.”

The Court then refers to the terms of the contract by which it is provided that the property shall not pass, and concludes:

“If, therefore, you find for the plaintiff, it will not be entitled to recover for the value of the apparatus installed by plaintiff, or any part thereof, since it remains its property and there is no evidence that it was lost or injured, but it will only be entitled to recover such damages as it has sustained in its endeavor to carry out the contract, such as the expense of delivery and installation thereof, and the necessary steps to have it returned to them.”

The plaintiff's proposed instruction, which was refused, covers the same subject matter, and hence should also be considered in this connection. It is as follows:

“But so far as this case is concerned, the insertion of this provision in the contract gave the defendant *no more or greater rights than if it had been omitted*, and should, therefore, be *wholly disregarded* by you in rendering your verdict.”

With respect to the *second and third generators*, the Court instructed the jury that they were not shipped, and were subsequently sold by plaintiff. So far the instruction could not be objected to, because it is admitted by the plaintiff. The Court then proceeds:

“As to those machines, therefore, if you find that they were sold for as much as plaintiff would have realized for them under the contract, the plaintiff can be allowed nothing for the failure of defendant to accept them.”

In this connection, the plaintiff had requested an instruction, which was refused, that the measure of damages suffered by plaintiff was the contract price for the entire installation, less the market value of the second and third generators at Portland, less the value of component parts of the switchboard at said time, less the freight charges on the switchboard to Portland, and less the cost of time, labor and materials necessary to erect the second and third generators, and which said requested instruction concluded with the following:

“The balance is the amount of damages suffered by the plaintiff. *Whether or not plaintiff received more than the cost of building the second and third generators at a sale to another party is utterly immaterial.*”

So far as concerns the refusal to give the two above requested instructions, we do not think much need be said. To have given them would have been plain error, no matter what construction is proper to be placed on the contract.

Returning, now, to the instruction given by the Court upon the question of damages as affected by the state of the title to the goods:

That instruction is criticised on the ground

“That the provision in the contract above referred to is for the benefit of the seller, who may either enforce it or waive it or proceed as in the case of an absolute sale.” (Brief, p. 23.)

To use the language of appellant's brief, “The seller is put to his election; the choice of one remedy is an abandonment of the other. Accordingly, *an action upon the contract for the price* of the article is held to vest the title in the purchaser.”

In support of this, he cites authorities from which he quotes, which, being accepted for what the appellant claims for them, are to the following effect:

“The plaintiff could either recover the property or *sue for the purchase price*. But the pursuit of one remedy necessarily excludes the other. It was not entitled both to the purchase price and the property.” etc.

Appellant then concludes:

“*The commencement of this action constituted plaintiff's election*. Upon such waiver the rule of damages ordinarily controlling in the case of a breach of a contract of sale became applicable. Under the facts here the plaintiff could recover *either the reasonable value of what it has delivered and installed*, or the contract price with proper deductions on account of those particulars in which the contract remained to be performed at the time of defendant's repudiation. The complaint was framed so as to *present both theories*. The first count pleaded partial performance of the contract by the plaintiff, readiness and ability to perform completely, and defendant's failure to pay and repudiation. The second count was in *indebitatus assumpsit*, for the value of the materials furnished.” (pp. 26, 27.)



There seems to be more than one answer to this attempted application of the rule to the facts of this case.

(a) In the first place, does it not appear *on the very statement of the case by the appellant* that he has not brought himself within the legal rights vouchsafed to him by the decisions mentioned?

Here he attempts to substitute an entirely different action from the one which the law says constitutes an election to confer the title. Both counts sound in *damages* for breach of contract. *Neither count is for the purchase price.* An action for the recovery of the reasonable value of *part of the property* delivered and installed, is not an action for the purchase price under this contract, which is an entirety. Neither is the action for the purchase price with the deductions specified, an action for the purchase price. It amounts to saying that plaintiff would retain the goods sold, and give the defendant credit for what is saved to plaintiff by not delivering and installing them. The purchase price represents the value when installed, and the deductions from that purchase price of the cost of installation, as proposed by plaintiff, leaves in the hands of plaintiff the value uninstalled, which value is in the goods retained by him. So his proposed instruction, as well as the action brought, is based on a reservation of title in the plaintiff.

Having alleged that he had partly performed, and was able, ready and willing to complete performance, he should have tendered the property to us and claimed the full purchase price. No title could pass to us by his retention of the property and a claim for the difference between value and the purchase price as damages.

Neither is an action of *indebitatus assumpsit* for the value of materials furnished, which are only a part of the materials contracted for, in a contract which is an entirety, "an action upon the contract for the purchase price." Suing for "the reasonable value" is not a suit for the purchase price, and *indebitatus assumpsit* ignores the contract. Besides, the second count does not state an action that would lie under the facts of this case.

"Where a special contract is still open, and has not been rescinded by *mutual consent*, it is necessary to declare specially."

And the common count in such case is insufficient.

BARRERE VS. SOMPS, 113 Cal. 97-101.

Hence, on his own statement, plaintiff has in the "commencement of this action," elected to retain the title under the provision of the contract under consideration.

(b) But in this case plaintiff made its election against the passing of the title before he began his action.

The evidence shows that before action was brought, the plaintiff had sold the other two generators in question, (p. 146), and had dismantled the switchboards and turned them back into stock. The plaintiff never delivered the principal part of the appliances, nor did it keep itself in readiness to deliver.

These acts are necessarily inconsistent with any title to the goods in the defendant, and determine the plaintiff's election with regard to all of the property covered by the contract, for it is conceded that the contract was an en-

tirety. All of the generators, switchboards, and accessories, were sold for a lump sum, to wit: \$7,850.00. (Rec. p. 4.)

The agreement to pay \$1,500.00 was not a segregation of or the fixing of a price on the first generator, but a mere payment on account of the gross price of \$7,850.00. In the language of the contract:

“It is agreed and understood that payment in the amount of \$1,500.00 will be made *on the total contract price* immediately upon installation and acceptance.” (Rec. pp. 2 and 3.)

This fact is recognized by the plaintiff in his correspondence and in the bill of particulars delivered by it, and in his brief on this appeal, where he makes the following statement (p. 27) :

“The agreement in suit was entire and provided for the payment of a single price for complete performance by the plaintiff.”

The entire transaction thus shows conclusively the election on the part of the plaintiff to retain the title to all of the apparatus, and to look to the defendant for damages suffered by the alleged breach.

Under these circumstances, the criticism of the instruction which they attack necessarily falls to the ground.

Inasmuch, therefore, as the Court's instruction “concerning the reservation of the title clause” was right, the additional criticism contained in the brief under Article 4 (pp. 27 and 28), also loses its point.

## II.

DISCUSSION IN APPELLANT'S BRIEF UNDER POINT 5, CLAIMING "THE EVIDENCE SHOWS WITHOUT CONFLICT THAT THE PLAINTIFF PERFORMED THE CONTRACT." (BRIEF, P. 29.)

Based on the foregoing assumption, appellant refers to "the doctrine of anticipatory breach," and argues that appellee committed the first breach, and therefore upon it rests all the liability for the non-performance of the contract by appellant.

1. We have already indicated that upon this point the Court gave its instructions to the jury. (Rec. pp. 181-185.) With regard to the law relating to what appellant calls "the doctrine of anticipatory breach," the Court instructed the jury in absolute accordance with the request of the appellant (pp. 181-182-183), and left the facts to be determined by the jury, without objection on the part of the plaintiff. We do not see what more favorable instruction the appellant could ask for.

We do not understand that questions of fact submitted to a jury without objection, can be retried in the appellate Court. It cannot be assumed on an appeal that a jury is bound to accept the testimony of any witness, or of any number of witnesses. They are the judges of their credibility, and if there were no other element justifying the submission of the questions of fact to the jury, this element is sufficient. It is, however, an element which the appellate Court is not able to consider upon an appeal.

2. But that is not all. We have heretofore called attention to the fact that there was a conflict in the testimony relating to the question of breach.

It is not our present purpose, nor do we think it necessary to make a close analysis of the testimony for the purpose of exhibiting this conflict. It is enough to suggest that the sufficiency of the generator was in question. That appellant (plaintiff below) claimed that the failure to get the required kilowatts was due to deficiency in the engine, and the respondent (defendant below) claimed it was due to deficiency in the generator, and evidence to support both contentions was introduced.

So, also, in this connection, the question of the sole-plate was involved. The plaintiff admitted that it placed a wooden temporary sole-plate under the generator, and afterwards attempted to substitute a permanent iron sole-plate.

The contract itself did not directly provide for this sole-plate, and a dispute arose as to whether it was the duty of the appellant or the respondent, to furnish it. As evidence that the appellant did not then contend that the contract obligated the respondent to furnish it, we have in proof the appellant's attempt to secure an auxiliary contract with the respondent upon this subject, which was declined. The appellant then, upon the trial, resorted to expert testimony for the purpose of fixing this duty upon the respondent, and called Mr. Hunt to testify that it was the general engineering practice for the engine to furnish the sole-plate. Of course, the jury were not bound to accept the testimony of Mr. Hunt upon this subject, nor, if accepted, was the testimony sufficient to bind the respondent, for there was no evidence that the respondent knew of any such practice or custom.



Appellant's discussion of this subject (p. 30 of his brief), even if it be accepted as it stands, shows sufficient for the submission of the question to the jury.

3. The contention that defendant was guilty of a substantial breach by its failure to pay the \$1,500.00 on July 15th, 1910, is also an assumption of fact upon a question properly submitted to the jury. It will be noted that under the contract, the \$1,500.00 was only to be paid after the generator was installed *and accepted*, and it never was accepted.

Moreover, the refusal of the respondent to pay the \$1,500.00 was never treated by the plaintiff as a breach. On the contrary, the plaintiff continued to urge the payment thereof, and notwithstanding the refusal to pay it, continued in the further installation and testing of the generator. It, therefore, cannot make that a basis for its argument respecting an "anticipatory breach." None of the cases upon which he relies contain this element.

On the other hand, it is a settled principle of law that a refusal by a party to perform his contract must not only be a distinct and unequivocally absolute refusal to perform the promise, "*but must be treated and acted upon as such* by the party to whom the promise was made; for *if he afterwards continue to urge or demand a compliance with the contract*, it is plain that he does not understand it to be at an end."

UNITED STATES VS. SMOOT, 15 Wall. 36;

HANSEN VS. SLAVEN, 98 Cal. 382;

BENJ. ON SALES, Sec. 568.

4. It is further claimed that defendant's letter of August 25th, 1910, was a repudiation of the contract, and appellant says, "At that time the plaintiff was clearly not in default." (pp. 31-32.)

Whether the plaintiff was, or was not, then in default, is one of the disputed questions of fact, but waiving that for the present, we call particular attention to this letter of August 25th, 1910. (Rec. pp. 139-141.) We claim it was *not* a repudiation of the contract by the respondent. In that letter defendant called the plaintiff to account for his several derelictions in the performance of the contract, and asserted that it appeared to defendant that the only term of the contract which appealed to the plaintiff was that defendant should make a payment of \$1,500.00 on July 15th. This is followed with a statement that defendant will not accept any *part* of their machinery "*until you have conclusively proven to us that you have done the work specified in your contract,*" etc.

While it is true that defendant further states, "That inasmuch as you have violated your contract with us, the same is void and of no effect," that statement was not intended as a repudiation of the contract, for it is followed with the suggestion to the plaintiff

"That instead of attempting to collect money from us, which is not due, and in no sense belongs to you, that *you get busy and do the very best you can toward rectifying the broken promises you made to us in your contract of May 25th.*"

Unquestionably the plaintiff did not then construe that as a repudiation of the contract, for Mr. Wernicke testifies that on September 2, 1910, he was informed by Mr.

Head that Colonel Spaulding had ordered the apparatus out of the Spaulding Building, and the defendant had lost their contract.

“Mr. Head and I were talking over the matter unofficially and I was asked what sort of an arrangement our Company would make to let the Samson Iron Works out of their contract with us, and unofficially I replied that we would probably make every allowance we could and list those machines which were still at the factory on the stock sheet, and endeavor to dispose of them for them, and also help them get rid of the generator that was in Portland, but that we probably would not accept cancellation of the contract.” (Rec. 159.)

Subsequently, on September 7th, he received a letter from the defendant, dated September 6th, notifying the plaintiff of the refusal of the Spaulding Company to accept the plant, and that the defendant would hold the plaintiff liable for all loss and damage on that account. And on September 12th, 1910, the defendant notified the respondent that the generator and appurtenances in the basement of the Spaulding Building were awaiting removal by the plaintiff, and concluded:

“We may needlessly add that we will have no further use for the generators ordered from you at this time.” (Rec. p. 179.)

So it will be seen that the attempt to fix “the repudiation by the defendant” as of August 25th, 1910, is at least, under the evidence, open to question, if not in fact absolutely unfounded. The least that can be said for it is that it presented a question for the jury, and since the verdict is against the plaintiff, the fact must, on this appeal, be assumed against them.

Then, again, with respect to the date when the two generators should have been delivered, the appellant says:

“The contract provided for the delivery ‘from our factory in approximately 90 days from date of *receipt of order*, with full and complete information.’ The proposal was accepted by the Iron Works May 26, 1910, and the contract was taken by Wernicke to Portland and thence mailed to Pittsburgh. There is no specific testimony of the date of its receipt at the factory, so the Court may *judicially conclude* that the contract arrived there about June 1st. The 90 day period expired August 30, 1910.” (Brief, p. 32.)

Here it appears that the appellant is again assuming as an “uncontradicted fact” matter that is open to dispute. Mr. Wernicke was the agent of the plaintiff. He received the order “with full and complete information” on May 26th, 1910. It would seem, therefore, that there is no occasion for resort to “judicial notice” to fix the expiration of the 90 day period, even though “judicial notice” were a proper method of supplying evidence upon this appeal. The 90 day period would, then, expire on August 25th. The repudiation in question was finally and absolutely made on September 12th.

Under such circumstances, was it, or was it not, within the purview of the jury to conclude that the plaintiff was guilty of a breach of its contract with respect to the delivery of the second and third generators before the alleged repudiation by the defendant?

We had not intended to go into so much detail regarding questions of fact, but we cannot refrain from criticising some of the statements made in appellant’s brief, though we do not pretend to have treated the matter exhaustively.

## III.

## ALLEGED INTRODUCTION OF HEARSAY TESTIMONY.

At the end of the brief we find a statement of an alleged error in permitting Mr. Head to testify to a conversation with Colonel Spaulding, at which no representative of the plaintiff was present, on the ground that said testimony is pure hearsay and incompetent.

Let us look for a moment at the facts:

1. We have a cross-complaint which alleges that the plaintiff knew that its contract was to be, and was then and there between said plaintiff and defendant intended to be, an integral part of a contract then about to be entered into between the defendant and said Spaulding. That in consequence of the failure of the plaintiff to perform its contract, defendant was, in turn, prevented from performing its contract with said Spaulding, and that on the 6th of September, 1910, *the defendant informed the plaintiff that said Spaulding had, by reason of the failure on the part of the said plaintiff to perform its portion of said contract, rescinded his contract with the defendant, and would hold said plaintiff liable for its loss, and thereafter on September 12th, 1910, defendant rescinded its contract with plaintiff.* (Rec. 62 and 63.)

These allegations raised an issue which made the testimony perfectly competent.

2. Moreover, if not otherwise competent, the plaintiff opened the door for its admission by previously calling Mr. Wernicke to testify to the very matter now objected to as hearsay.



In this testimony Mr. Wernicke testifies to what Mr. Head told him concerning the Head-Spauldning conversation, and that as a result, Mr. Head and Mr. Wernicke discussed methods for adjusting the difficulty which Mr. Spaulding's cancellation of the contract had brought about. We will not detail this testimony, but refer to the Record, pages 158 and 159. It will be noted that Mr. Wernicke fixes the date of this conversation as September 2nd, while Mr. Head fixes it as September 6th. (Rec. p. 173.) Which is right the jury determine.

3. Again: Mr. Head's testimony respecting the Spaulding conversation is introduced as part of what Mr. Head told Mr. Wernicke, the plaintiff's agent. He is not testifying to it as an independent fact. After relating the conversation with Colonel Spaulding, he continues:

"That was preceding the conversation with Mr. Wernicke. I then told Mr. Wernicke about it, and I told him that the way they had held off the work there it had forced Colonel Spaulding to cancel the contract on us," etc. (Rec. p. 172.)

\* \* \* \* \*

"That entire transaction took place on the same date. The conversation with Mr. Wernicke was in the basement, and that with Mr. Spaulding in his office upstairs in the same building." (Rec. p. 173.)

Such testimony is not subject to objection as hearsay.

JONES ON EVIDENCE, Secs. 300, 344, et seq.

4. And once again: Mr. Wynn, Mr. Spaulding's superintendent, had testified on behalf of the plaintiff as to what he understood was the reason Colonel Spaulding directed the Samson Iron Works to remove their machines from the building. (Rec. pp. 150-151.)

Why, then, was it not competent to introduce evidence in contradiction to Mr. Wynn's statement, showing exactly what Colonel Spaulding had to say upon the subject?

Appellant seems to recognize the effect of the introduction of Mr. Wynn's testimony upon the question here under consideration, and attempts to parry it with the suggestion (Brief, p. 37) :

"Of course, the presence of this testimony in the record did not *render harmless* the admission of Colonel Spaulding's statement. It cannot be conclusively presumed that the jury made the analysis of the evidence necessary to reach the conclusion just demonstrated."

But the question now before the Court is not whether or no Mr. Wynn's testimony "rendered harmless the admission of Colonel Spaulding's statement." It is whether or no the presence of that testimony rendered the latter admissible. Upon this question it would not seem that there can be much doubt, as it is plainly in rebuttal of Mr. Wynn's testimony.

We are confining our argument to matters raised in appellant's brief, as we assume all other alleged errors are waived.

We respectfully submit that the appeal should be dismissed.

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No. 2674

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

WESTINGHOUSE ELECTRIC & MANUFACTURING  
COMPANY (a corporation),

*Plaintiff in Error,*

vs.

SAMSON IRON WORKS (a corporation),

*Defendant in Error.*

## REPLY BRIEF OF PLAINTIFF IN ERROR.

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Filed this.....day of May, 1916.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.





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## REPLY BRIEF OF PLAINTIFF IN ERROR.

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### 1. Introductory.

Defendant's criticism of the statement of the case contained in our opening brief is not susceptible of reply for the reason that defendant makes no specific statement whatever but is content to say that our analysis of the facts is faulty. Defendant asserts that there was a conflict of evidence upon the issues in the case, but fails to show wherein the conflict exists. It is true that the important factor in controversy was whether plaintiff's generator or defendant's gas engine was responsible for the failure. But the mere assertion of defendant that its gas engine was not at fault did not create a conflict

of evidence upon that issue. The record must be examined to determine what evidence was adduced. This was fairly done in the opening brief. The statement of facts therein contained is complete and stands uncontradicted.

But the purpose of the consideration of the evidence in the opening brief has been misconstrued by the defendant. The specific errors upon which we rely for reversal were committed in the instructions to the jury. For the sake of the discussion of these errors, it may readily be conceded that the issue of responsibility was an open one. For the purpose of the argument in this behalf it must be assumed, not that the jury had no alternative but to find for the plaintiff on the merits but merely that under the evidence they might have so found. The propriety of the instructions is thus to be considered from the standpoint that the jury may have decided in favor of the plaintiff.

Having argued these questions, the opening brief proceeds to analyze the record and to present the view that upon unconflicting evidence the defendant was at fault. The primary purpose of this discussion was to show how manifestly prejudicial the erroneous instructions were. If a verdict for the plaintiff was the only legal conclusion, it was entitled to substantial damages and any error in the instructions must have been prejudicial. It is true the lower court submitted the issue of responsibility to the jury. But the opinion of the trial judge in

this regard is not conclusive upon this Court. We are content, however, to employ this subject as the means of emphasizing the gravity to the plaintiff of the errors in the charge to the jury upon the question of damages. Accordingly, a few words will be devoted later in this reply to the argument of the defendant upon the merits of this issue.

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**2. It Can Not be Said that the Errors in the Instructions Concerning Damages Were Not Prejudicial to the Plaintiff.**

Defendant's contention that the errors in the charge to the jury upon which we rely were harmless rests in part upon the fact that the trial judge called upon the jury to determine which party was responsible for the defective installation. Defendant argues that the verdict in its favor was a decision for it upon the merits and that the jury never considered the question of damages. This would be correct if there had been but one issue to be decided by the jury. But defendant loses sight of the fact that the question of culpability was only one of the issues in the case. Surely no one will say that the decision on that issue concluded the jury's functions. When they found that the defendant was at fault they were then called upon to determine what damage plaintiff had suffered from the breach. That was essential to a verdict. So if the only element of

damage upon which the jury were disposed to give plaintiff relief had been removed from their consideration by the express injunction of the trial judge, they must give the defendant a verdict for its costs. Thus it is futile to argue that because the jury must first pass upon the issue of responsibility, it was impossible for them to deny plaintiff relief upon the ground that in their opinion and under the law as stated by the court they found no damage proved. In baldly asserting that the verdict means that the jury found the plaintiff at fault the defendant professes a clairvoyance to which no court has ever pretended.

It is plain from defendant's brief that it misconceives the true rule of prejudicial error. Defendant assumes that the burden is upon us to point out specifically wherein the error committed must necessarily have affected the decision against us. In this defendant is mistaken. The burden rests upon it. From error prejudice is presumed unless it can be conclusively shown on every possible hypothesis that the error played no part in the jury's mind. For example, in *Vicksburg etc. R. R. v. O'Brien*, 119 U. S. 99, it was held:

We are unable to say that the defendant was not injuriously affected by the reading of the physician's certificate in evidence. \* \* \* It is well settled that a reversal will be directed unless it appears, beyond doubt, that the error complained of *did not and could not* have prejudiced the rights of the party. (p. 103)

In *Chicago Ry. Co. v. Sutton*, 63 Fed. 394, the Circuit Court of Appeals for the Eighth Circuit held:

The jury may have thought that the engineer had no right to proceed with his engine; no matter how slowly, after discovering the boy in proximity to the tract, until he had left that neighborhood and was entirely out of danger; or it may have been that the jury believed the engineer to have been guilty of some other slight error of judgment, which rendered him culpable within the stringent rule of liability announced by the trial court. *But it is unnecessary to indulge in speculations of this nature.* It is sufficient to warrant a reversal of the case that the charge was erroneous; that it may have misled the jury; and *that it does not affirmatively appear that the misdirection was harmless error.* (p. 399)

In *Durant Mining Co. v. Percy Co.*, 93 Fed. 166 (C. C. A.), it was held: "The presumption from error is prejudice." (p. 169).

The case of *Green v. White*, 37 N. Y. 405, is almost directly in point and goes much further than is necessary in the case at bar. That was an action for breach of contract in which the defendant had agreed, for the sum of \$3,000, to sell and deliver a ship to the plaintiffs, and to pay to the plaintiffs the profits earned upon a certain voyage. The jury were instructed that the measure of damages for defendant's refusal to perform was the difference between the contract price, to-wit, \$3,000, and the actual value of the ship; that if that value were



equal to or less than the contract price no damages could be given on account of the breach, but that the plaintiffs would nevertheless be entitled to a verdict for such net freight as had been made on the trip. An instruction offered by the defendant that if the value of the vessel plus the net freight did not exceed \$3,000 the plaintiffs could not recover, was refused. A verdict was rendered in favor of plaintiffs for \$700. Upon appeal it was held that the court's instructions and refusal to give that requested by the defendant were erroneous "in that the contract for the purchase of the vessel and her freight was entire; the two subjects together were purchased and sold, at the price of \$3,000, and as one purchase and sale; there is no power or right of separation into parts."

No witness put the value of the freight at more than \$200, and so plaintiffs argued that this was an absolute indication that the jury had found the vessel to be worth more than \$3,000, and therefore the objectionable part of the instruction given did not become applicable. In rejecting this contention the court held:

If it is possible that the defendant was injured by this error, the verdict must be set aside. It is not for the defendant to show how or to what extent he was prejudiced; the existence of the error establishes his claim to relief. If the plaintiffs wish to sustain the verdict, it is for them to show that the error did not and could not have affected it.

The plaintiffs insist that this is established. They insist, that if the jury did not find the vessel to be worth less than \$3000, then the latter portion of the objectionable charge, that the plaintiff would still be entitled to the value of the net freight, was not applicable; the contingency therein stated did not occur. The verdict of \$700 is claimed to be conclusive evidence that the vessel alone was worth more than \$3000, as no witness put the value of the freight at more than about \$200. This may be true, and I think it quite probable that it is. It would, however, be unsafe to disregard an admitted error on this theory. No one can certainly say how the minds of individual jurors are affected, or how a united result was reached. (pp. 406-07)

See also *St. Louis etc. Ry. Co. v. Needham et al.*, 63 Fed. 107. (C. C. A.)

Instead of undertaking its burden in this respect and showing affirmatively that the errors complained of were harmless, defendant merely comments upon the argument in the opening brief, which disclosed wherein the errors must materially have affected the decision. In doing so we went further than was necessary to entitle us to have the errors reviewed in this Court. Defendant's misconception of the rule of appellate procedure is clearly disclosed at page 6 of its brief. Reference is made there to plaintiff's endeavor "to establish that the alleged error in the instruction regarding the damages would not be harmless error." Under the authorities cited above we are under no such duty. The burden is on the defendant, and in not

undertaking it, defendant has failed to make any showing to prevent the consideration by this Court of the propriety of the instructions.

Let us, however, consider defendant's argument as far as it goes.

We suggested in the opening brief that the jury were enjoined from awarding any damages on account of the first generator. Defendant questions the accuracy of this statement.

The measure of damages was the contract price less the value of the parts not delivered and certain other deductions. The jury were told that since title to the first generator had not passed they must subtract its value as well as that of the other two from the total price. It follows that in so far as the first generator played any part in the contract price the jury were foreclosed from allowing the plaintiff any recovery.

In response to this defendant points to the charge that plaintiff was entitled to recover the expense of installation and removal of the generator and the profit lost (brief, page 5). This contention was anticipated in the opening brief; it was there explained that inasmuch as we did not contemplate erroneous instructions, we offered no evidence to meet the view ultimately expressed by the trial court. Defendant contradicts this, asserting:

“It (plaintiff) certainly offered evidence of the expense of putting the cables and bed-plate in. It also offered evidence of the reasonable

cost of the installation of the second and third generators and permanent switchboard." (brief, p. 5).

The statement that we offered evidence of the expense of laying the cables and bed-plate is absolutely without authority in the record. Defendant cites page 160 of the transcript. There appears at that page a *letter* written by plaintiff to defendant. Statements in this letter are, of course, evidence of nothing. But there is no word there *about cables*. The letter recites that Wernicke had ordered three bed-plates at the factory at the price of \$35 each. *But none of these was ever delivered or used*. The castiron sole-plate placed under the first generator had been made to order at Portland (Testimony of Wilson, p. 129).

The evidence relating to the other generators and the switchboard was that to install all of them would cost \$400. Surely this did not prove anything concerning the cost of the installation of the first generator. It did not appear that the method or expense of erecting any two generators was the same. The lump figure for the switchboard and remaining generators afforded no basis for calculation as to the first. Reverse the situation and suppose that the plaintiff were contending that the testimony in question was a sufficient showing of the cost of the installation of the first generator. Such an argument would be absurd.

But even if there had been some evidence of the cost of installing the first generator no one can say that the jury did not choose to ignore it and were disposed to allow the plaintiff something only on account of the generator itself. This the trial judge forbade.

This is merely one application of the rule above stated that every possibility that the error affected the decision must be eliminated before the reviewing court can say that the error was not prejudicial.

By way of further example, we suggested in the opening brief that even assuming that the jury were permitted under the instructions to award damages to the plaintiff, they might have found the parties both at fault and set off the defendant's damages under its counter-claim. To this defendant replies that if plaintiff were found to have been at fault, no recovery could be had by it. Thus defendant ignores the very gist of this idea—that both parties may have been guilty of a breach of contract and therefore each liable to respond to the other in damages. The jury could have found that the plaintiff had performed the contract as to the first generator and was entitled to recover on that account. Assuming, then, that the jury decided further that the plaintiff was late in the delivery of the remaining apparatus, defendant would have its remedy for that. The breach on each side would entitle the other to damages but might not be of sufficient gravity to deprive the parties of their respective



claims upon the contract. Just such a situation was presented in *Ames Iron Works v. Rea*, 19 S. W. 1063 (Ark.), which will be fully stated in a later section of this brief.

Defendant's argument proceeds on the assumption that it is legally impossible for both contracting parties to have an action for damages upon the same contract. Defendant thus fails utterly to realize the meaning and effect of independent covenants. One party's performance may be such that while he is entitled to recover, he must at the same time pay the other on account of the features in which the performance is defective. This is the underlying substance of the remedy of counter-claim which the defendant has invoked. The subject is so fundamental in the law of contracts that a general citation will suffice.

*9 Cyc.*, 642;

*Philips Construction Co. v. Seymour*, 91 U. S. 646, 650-1.

The opening brief offered still another suggestion of the likelihood of prejudice flowing from the errors in the charge. This concerned the second and third generators. The jury were told that if these were sold for as much as they would have brought plaintiff under the contract, "the plaintiff can be allowed nothing for the failure of defendant to accept them." (\*186) This was a distinct prohibition against giving plaintiff any damages on this account.

Defendant's breach contains no mention of this feature of the case.

Furthermore, if the evidence permitted no other conclusion that the defendant was at fault, the verdict in its favor must necessarily have been produced by the instructions depriving the plaintiff of its principal items of damage.

We conclude, therefore, not only that defendant has failed to show that the errors complained of were harmless but that many features in which prejudice may have resulted have been affirmatively established. It follows that the accuracy of the instructions is a vital factor upon which the integrity of the judgment depends.

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### **3. Error Was Committed in Giving and Refusing Instructions Concerning the Title to the Delivered Generator.**

Defendant does not question the statement in the opening brief of the rule that in a contract of conditional sale the vendor may waive his title. Defendant's sole objection to the application of that rule to the case at bar is that the plaintiff elected not to waive its title but to insist upon it. This election is said to have been made both in the form of the complaint filed and in the conduct of the plaintiff after defendant's repudiation.

It is at once notable that the position of the defendant here is not the same as that presented in

the instructions of the trial judge. The defendant does not say that the lower court was correct in its view that the contract required the plaintiff to resume possession of the first generator. The jury were not instructed at all upon the proposition for which defendant now contends, to-wit, that the plaintiff elected to assert its title to the first generator. If the defendant's position is sound, it should have obtained such an instruction, and a verdict based thereon would be safe from attack. But no such instruction was asked and defendant is now put to the necessity of advancing an argument upon an immaterial matter in an endeavor to avoid the natural result of the error in the charge, which there is no attempt to defend.

However, we will assume that the defendant's contention is available here and answer it on the merits.

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#### **4. The Complaint Is an Election to Waive the Title Clause. The Count on the Special Contract Examined.**

Let us first consider the count in the complaint based upon the special contract. It must be borne in mind that the breach of this contract occurred after the first generator had been delivered and installed and before the other apparatus had been started on its way to the point of delivery. The method most conducive to clear analysis is to put oneself in the place of the plaintiff at this moment.

The defendant has repudiated the contract and the plaintiff desires to avail itself of its legal remedy. The contract preserves title to all the apparatus described even though delivered and installed, but the plaintiff is advised of its right to waive the title clause and prefers to do so. What is the form of a complaint suitable to present its case?

If the title clause is waived (and defendant does not say that it can not be waived), the case stands as if that clause were not in the agreement. The plaintiff then may invoke the remedy which the law provides in a case of a contract of sale where delivery accomplishes the passing of title. The vendor's remedy on the contract after partial delivery is well settled. The measure of recovery is the contract price less what the vendor has been saved in the particulars in which he has not yet performed. These deductions include the value of the apparatus undelivered since that value may be realized at once from other sources. But the law does not deduct the value of the article which has been delivered and installed. This rule is applied by the Circuit Court of Appeals of the Third Circuit in *Fisher v. Newark*, 62 Fed. 569, where there had been a partial delivery under a contract of sale followed by a breach by the vendee. After a judgment for the vendee it was held on writ of error prosecuted by the vendor:

The plaintiff is not entitled to the balance of the purchase money; but only to such sum as will cover his loss—in other words, the profit

he would have made if the ice had been taken and paid for according to the contract. This may be ascertained by deducting from the unpaid purchase money the value of *the undelivered ice* in the market (in Canada) at the time it should have been taken, and the expenses of loading, etc., saved to the plaintiff by the failure to take it. (p. 573.)

See also *Yellow Jacket Co. v. Chapman*, 74 Fed. 444, 56, (C. C. A., 4th Cir.)

It is noteworthy that the same measure of damages is prescribed by the California Civil Code (Secs. 3310 and 3311). The undelivered apparatus not having been sold as in the case of a pledge, subdivision 2 of section 3311 would be controlling in the case at bar.

As the opening brief states (pp. 27-8), the trial judge recognized this to be the correct rule of damages. But he refused to instruct that the plaintiff could waive the title clause, and he required that the value of the first generator be deducted from the contract price as well as that of the undelivered apparatus.

The plaintiff's complaint is based precisely upon the theory above discussed. It alleges first, the delivery and erection of the first generator; second, readiness to perform the remaining features of the contract and finally, defendant's repudiation from which flowed the legal conclusion that the plaintiff must desist and mitigate the damages by holding the apparatus undelivered at its value.



The bill of items served by plaintiff in response to defendant's demand confirms this idea in detail. Under the rule of the California Supreme Court, which is binding here since it concerns a matter of pleading, the bill of items became a part of the complaint. (*Chapman v. Bent*, 133 Cal. XIX; 65 Pac. 959, 61). It specifies:

Contract price.....		\$7,850.00
Less total of following:		
2d and 3d generators not delivered .....	\$2,477.67	
Freight on same not incurred.....	305.60	
Switchboard not delivered.....	1,267.83	
Freight on same not incurred.....	100.80	4,151.90
		<hr/>
		\$3,698.10 (*95)

Thus plaintiff's statement of the cause of action shows with the utmost clearness that the title clause was waived and that plaintiff was proceeding as in the case of an ordinary sale. The bill of items pursues the measure of recovery prescribed in *Fisher v. Newark Ice Co.*, (*supra*.) It deducts the value of the features in which the contract was unperformed. It does not deduct the value of the first generator, thus showing distinctly that the plaintiff considered that the title to the installed generator had passed—as to that apparatus the title clause had been waived.

The situation respecting the other apparatus is, of course, different. Regardless of the reservation of title these articles belonged to the plaintiff be-

cause they had not been delivered. The title clause is material and controlling only in relation to the apparatus delivered which would otherwise in the ordinary contract of sale become the property of the purchaser. Thus it is solely as to the delivered article that the reservation of title is susceptible of waiver.

Let us examine now the argument which defendant advances in support of the assertion that the complaint was an election to assert title to the first generator. It is said:

Having alleged that he had partly performed, and was able, ready and willing to complete performance, he should have tendered the property to us and claimed the full purchase price.  
(p. 10)

Under settled principles settled by the great weight of authority and exemplified in the cases above cited, the plaintiff could not proceed as the defendant suggests. Such a remedy in all cases of contract of sale is allowed only in New York (*Ideal Cash Register Co. v. Zunino*, 79 N. Y. S. 504). But in practically every other jurisdiction the seller can force title on the buyer only where the articles undelivered have been manufactured for a particular purpose and have no independent market value (*Kinkead v. Lynch*, 132 Fed. 692). But even in such a case the vendor has the option to pursue either remedy; that is, he may hold the article as the property of the buyer or recover the difference between the contract price and its value (*Id.*). And

contrary to the suggestion made by defendant, it is not necessary for the seller to make a tender after the buyer's repudiation (*Habeler v. Rogers*, 131 Fed. 43). In the face of a repudiation a tender would be a vain act, which the law does not require.

Defendant offers but one other reason why this action did not constitute an election to waive the title clause. It is said that the plaintiff does not ask for the purchase price but for damages computed by deducting certain items from the purchase price. It is noteworthy that defendant cites no case to support the distinction thus asserted. In fact, defendant's entire brief is conspicuous for the lack of authority upon which to rest the legal propositions for which it contends.

As we have already shown, the repudiation by the defendant while the contract was in the course of performance prevented the plaintiff from completing its obligations so as to demand the full contract price. Accordingly, the amount of plaintiff's recovery was to be reduced. Thus it was not by plaintiff's choice that the action was not for the entire purchase price; therefore it cannot be said that the nature of the suit constitutes an election. Surely, there is no basis in reason nor on principle why a vendor should be deprived of his right to waive his title to those articles which have been delivered, particularly when the vendee's repudiation has prevented the delivery of the remainder and a consequent obligation to pay in full.

There is no difference in legal theory between an action upon a contract of sale after full performance in which the entire contract price is sought to be recovered and an action after partial performance in which the contract price with certain deductions is the measure of recovery. Both are actions for breach of contract and ask damages for the breach. In one case the breach is the failure to pay the full price stipulated and the measure of damages is the contract price, hence the colloquial expression that the action is for that price. In the other case the breach is dual—failure to pay and prevention of performance—and the damages are computed by subtracting from the contract price what is saved the vendor because he has not been required to complete performance. Thus in *Sedgwick on Damages* (9th ed., vol. 2, p. 1564), it is said:

Where a vendee is sued for non-performance of the contract on his part, in not paying the contract price, if the goods have been delivered, the measure of damages is of course the price named in the agreement.

In *Kinkead v. Lynch*, 132 Fed. 692, Judge Sawyer held in this Circuit:

Does not the testimony in the present case put plaintiff in the position of having fully performed his contract or agreement with the defendants, and establish the fact that he made a proper tender of the delivery of the property;

and, if this be so, would not the rule applicable to the case be that he is entitled to recover the contract price, if there was any, and, if not, the value of the machinery as manufactured, *as his measure of damages.* (p. 696)

In *Lincoln etc. Mfg. Co. v. Sheldon*, 62 N. W. 480 (Neb.) after citing numerous cases to this effect, the court states the following rule concerning the remedies appropriate to the case before it:

He (the vendor) may keep the property made the subject of the contract, and sue the vendee for his failure to perform, and in such a case his *measure of damages* will be the difference between the contract price of the property and its actual value at the date of the breach of the contract; or the vendor may tender the property made the subject of the contract to the vendee, and then, in a suit upon the contract, the vendor's *measure of damage* will be the contract price of the property. (p. 483)

The law of damages is codified upon the same theory in the California Civil Code. Under the chapter headed "Measure of Damages" and the sub-title "Damages for Breach of Contract," it is provided generally:

For the breach of an obligation arising from contract, the *measure of damages*, except where otherwise expressly provided by this code, is the amount which will compensate the party aggrieved for *all the detriment* proximately caused thereby, or which, in the ordinary course of things, will be likely to result therefrom. (Sec. 3300)



The special cases under consideration here are then provided for in analogous terms. It is declared in the one instance:

The *detriment* caused by the breach of a buyer's agreement to accept and pay for personal property, the title to which is vested in him, is deemed to be the contract price. (Sec. 3310)

And where the title is not vested the *detriment* is determined by the rule which has been fully discussed above (Civil Code, sec. 3311).

There is still another answer to defendant's contention that the complaint is an election by plaintiff to assert title to the first generator. Under the law such election is manifested by an action *to recover possession of the property delivered*. (See cases cited in opening brief). Plainly, there is nothing in the complaint which can be construed into an attempt to replevy the first generator. Therefore, plaintiff's right to pursue the remedy which it would have in the case of unconditional sale was never foregone.

And as a final reply to the defendant's argument: The complaint seeks to recover compensation which is due only upon the theory that the obligations imposed upon the defendant by the contract were still in force and that the defendant must pay damages for breaching them. This demand is a positive declaration that the plaintiff did not assert its title to the delivered generator but elected to waive it. If a vendor asserts his privilege under

the title clause and elects to enforce his right to possession, the contract is thereby rescinded. It was so held in *Manson v. Dayton*, 153 Fed. 258 (C. C. A. 8th Circ.), where the following extracts were quoted from other opinions:

Although called a lease, the transaction was intended to be, and in effect was, a conditional sale; the vendor reserving the title until the final payment should be made, and the right of rescission, in case the purchaser should fail in the payment of any installments of the so-called rent, or an additional amount to make the total sum \$1,700. (p. 265)

\* \* \* \* \*

But they rescinded the contract by retaking into possession the subject of it, which they had a right to do. (p. 266)

In *Dunlop v. Mercer*, 156 Fed. 545, the same court held concerning the exercise of the right of the vendor under conditional sale to resume possession:

The legal effect of that taking, under the established rule of property in Minnesota, would be to annul the obligation to pay the agreed price of the property taken. (p. 549)

In *Sugar Beets Co. v. Lyons Co.*, 161 Fed. 215, the court, speaking of the remedies of the vendor, held:

Concededly an action at law may be brought to recover possession of the drier, or for breach of contract, or for the balance of the purchase price unpaid. That a rescission of the contract would be necessary before instituting the first-mentioned remedy, or that the amount paid to apply on the purchase price would have to be

refunded, or that the right to future deliveries of dried pulp may be deemed uncertain, are not sufficient reasons, in the circumstances narrated in the bill, for invoking the power of a court of equity. (pp. 217-18)

Again, in *Bray v. Lowery*, 163 Cal. 256, it was held:

By this seizure of the cars upon the claim that respondent was in default and by his refusal to return the property, appellant treated the contract as abandoned and annulled by respondent. Formal rescission on the part of the latter was, therefore, not necessary. (p. 261)

Upon the same subject it was held in *Kelley Springfield Co. v. Schlimme*, 69 Atl. 867 (Penna.):

It could "enter upon the premises where said rollers may be located, and take possession of, and remove same without trespass," thereby rescinding the contract. (pp. 868-69)

It is axiomatic that a rescission puts an end to the contract for all purposes and precludes an action upon the contract for damages. In *Mundt v. Simpkins*, 115 N. W. 325 (Neb.), it was held:

The law is too well settled to need discussion that if a party elects to rescind a contract he can not sue thereon to recover damages for its breach, and if he affirms the contract by suing for a breach he cannot thereafter rescind.

The same distinction is pointed out by Justice Brewer in *Anvil Mining Co. v. Humble*, 153 U. S. 540, at page 552:

In *Smeesters v. Schroeders*, 101 N. W. 363 (Wis.), upon the same subject it was said

It is, of course, apparent, as stated in the cases above cited, that the remedies above described are wholly inconsistent. Either there is a contract, for breach of which plaintiff is entitled to recover damages, or the contract is set aside and goes out of existence. (p. 364)

In *Abraham v. Browder*, 21 So. 818 (Ala.), it was held:

He cannot insist that a contract has been rescinded, and yet recover on the contract. (p. 818)

See also *Houser Co. v. McKay*, 101 Pac. 894 (Wash.).

The action here is obviously based upon the contract and upon its continued existence as the basis of relief. The complaint is therefore utterly inconsistent with the idea of the assertion of title to the delivered generator and the rescission which that attitude on plaintiff's part would necessarily accomplish.

We conclude therefore that the count in the complaint based upon the special contract clearly discloses the plaintiff's election to pursue its remedy independent of the title clause and to waive its title to the delivered generator. This election is, moreover, established beyond question by the specific terms of the bill of items.

## 5. The Count for the Value of Materials Delivered Is an Election to Waive the Title Clause.

Defendant does not contend that this count is not based upon a waiver of the title clause. Plainly, it could rest upon no other theory. Defendant argues that a suit for the reasonable value of the first generator is not "an action on the contract for the purchase price." (Brief, p. 11). By this the defendant apparently means to say that a vendor under conditional sale who waives his title may recover the price of the article delivered but not its value. There is no possible basis for this contention. The waiver of title leaves the vendor with his usual remedies upon a sale of property. Suppose no price is specified in the contract. In that case the recovery can only be determined by the reasonable value of the article. The defendant cites no case deciding that a vendor under conditional sale may not recover the value of the article delivered. The authorities are clear that he may. For example, in *Thienes v. Francis*, 138 Pac. 845 (Ore.), it was held:

Where a contract for the conditional sale of personal property has been broken by the vendee, the vendor may waive his rights to recover possession of the property and sue for the value thereof, treating the contract as executed. By the sale of the property before title passed, Thienes broke the contract of conditional sale; therefore Francis had the right to sue for the value of the same, and the decree in regard thereto is affirmed. (p. 846)



And in *Poirier Mfg. Co. v. Kitts*, 120 N. W. 558 (N. Dak.), the court held:

The vendor under a contract of conditional sale may elect whether he will recover possession of the property sold in which he still retains title, or waive his title and *sue for the value* or selling price, but he cannot do both. (p. 560)

Defendant also asserts that under the facts here the count for the value of the article delivered will not lie (citing *Barrere v. Somps*, 113 Cal. 97). That was a suit for money had and received. A deposit had been made with the defendant as security under an agreement which required the performance of certain acts by the plaintiff. These matters were still undetermined and it was accordingly held that the case proved did not come within the scope of the complaint.

On the other hand, the authorities hold without dissent that where partial performance has been given by one party to a contract and the other is guilty of a breach, the former may either bring action for damages upon the contract or sue for the value of what he has rendered. Thus Professor Lawson, in his article upon "Contracts", after discussing the subject of repudiation, says:

The rules stated in the above sections apply also when the renunciation is made in the course of performance, for renunciation of a contract by one of the parties in the course of performance discharges the other party from a

continued performance of his promise, and entitles him to sue at once for the breach, or on a *quantum meruit*.

(9 Cyc. 639.)

In *Upstone v. Weir*, 54 Cal. 124, it was held concerning the remedies of the seller upon breach by the buyer:

If the plaintiff had chosen to waive his contract and sue in general assumpsit for materials furnished, then his measure of damages would be the value of the ironwork actually furnished. (p. 126)

And in *United States v. Molloy*, 127 Fed. 953 (C. C. A. 2d Circ.), it was held:

Where a purchaser of goods wrongfully breaks the contract of sale, the seller is entitled to sue on a quantum valebat for compensation for his partial performance. (Syl. 2).

It follows that the plaintiff could waive its title to the first generator and sue for its reasonable value. The complaint contains appropriate pleading for this purpose.

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## **6. The Sale and Other Disposition of the Apparatus Undelivered Was Not an Election to Assert Title to the Delivered Generator.**

The discussion pertinent under this title is substantially presented in the foregoing section. Since upon the theory of a waiver of the reservation of title the plaintiff had no alternative but to dispose

of the undelivered property—as it did—it is idle for the defendant to argue that its action was an assertion of its rights under the title clause. Defendant's contention is that since the plaintiff asserted title to that which was still in its possession, its conduct must necessarily have had the same effect as to the first generator which had been installed. Again, no authority is cited. None exists. The waiver by plaintiff of the right to resume possession of the delivered apparatus placed the parties in the same position as if the contract were one of unconditional sale. The plaintiff then acted in accordance with the dictates of the law. Upon the defendant's breach the second and third generators were freed of the obligations of the contract and their value became a factor in mitigation of the plaintiff's damages. For the same purpose—to minimize the damages—the plaintiff dismantled the switchboard, which had no selling possibility and would otherwise have been a total loss for which the defendant would have been compelled to pay (\*146). Even in a jurisdiction which confers upon the vendor the right to hold the undelivered property as that of the vendee and fixes the damages at the full contract price, there would be no sound reason in depriving him of his right to waive title as to the delivered property as a penalty for his desire to aid the vendee by retaining the balance in reduction of the latter's loss.

What the defendant's contention really means—although defendant avoids saying it—is that where under an entire contract of conditional sale the

vendee repudiates after partial performance, the vendor has no choice but must resume possession of the delivered property. Since under the law of nearly every jurisdiction he cannot force title to the undelivered articles upon the vendee and is required to treat them as his own, it would follow from defendant's argument that the vendor is compelled to assert his title to that which has been delivered. Surely, there is nothing in reason nor in authority to support this idea.

The issue should not be confused by any consideration concerning the delivery of the first generator. There was ample evidence that it had been incorporated into the defendant's installation in the Spalding building. However, the instructions which are in controversy are framed upon the theory that the generator had been installed (\*185), and they expressly concede that there had been a "delivery and installation" (\*185-6). And it is fundamental that acceptance is unnecessary where there is a proper delivery (35 Cyc. 257).

If all the apparatus contracted for had been delivered, and defendant had refused to pay, the plaintiff could have waived title and brought an action on the contract, alleging damages in the amount of the agreed price. Why, then, should the privilege to waive title be withheld from the vendor because the vendee has abandoned the contract after partial delivery? There is really no assertion to title to the property remaining in the vendor's hands. He acts merely in mitigation of damages.

Moreover, the stipulation reserving title does not become operative upon any property until it has been delivered. Prior to delivery title ordinarily inheres in the vendor regardless of any such clause in the contract. It is self-evident that a provision reserving title is an unnecessary statement of a legal conclusion until the property is delivered. Then for the first time it comes into force and alters the legal status. Therefore, as to any property which has not been delivered the right or duty to elect under the title clause does not accrue. Thus, it is plain that neither the fact that two generators and the switchboard had not been delivered nor the action of the plaintiff concerning these articles had the slightest bearing upon its privilege to waive its title as to the delivered generator and proceed as in case of an unconditional sale.

Moreover, to hold otherwise would confer upon the guilty vendee the power to prejudice the right of election which the agreement reserved to the vendor. By repudiating the contract before complete delivery, the vendee could destroy the vendor's option and force him to take back what had been delivered. That this is opposed to the underlying theory of conditional sales is clearly decided. In *Detroit Heating Co. v. Stevens*, 52 Pac. 379 (Utah), the contract was similar to that at bar. The plaintiff had

agreed to furnish and erect for defendant in his carriage and implement building at Ogden,



Utah, a hot-water heater, with all the usual and necessary attachments and connections. (p. 379)

The agreement contained the usual clause reserving title. Concerning it the court held:

It was not in the power of the defendant to take advantage of the condition, and regard the title as in the plaintiff, and rescind the contract, or maintain he had not accepted the heater, and refuse to pay for it, for the same reason.

\* \* \* But upon the conceded facts, and upon those as to which there is no room for a difference of opinion as to their existence, from the evidence, we must hold as a matter of law, that the defendant accepted the heater, and had no right to elect to rescind the contract as he did; and that plaintiff must recover, if at all, *damages for a breach of the contract*. (p. 382)

In *Appleton v. Norwalk*, 22 Atl. 681, it was held:

It is said that the plaintiffs had the right, at their option, to retake the property at any time if the defendant fail to pay any installment for a period of 30 days after it became due. But this is a right which the plaintiffs had in case the defendant should break the contract by non-payment. It gives the defendant no right to return the books. (p. 681)

And in *Ainsworth v. Rhines*, 69 N. Y. S. 876, the court, discussing the position of the vendee under a conditional sale, held:

Neither the contract nor the principles of law gave defendant the right, if he became sick of his contract, to terminate it, and return the

piano and escape further liability. As to him, the contract fixed his liability, and did not give him the right to terminate it. (p. 877)

A case of partial delivery under a conditional sale was presented in *Ames Iron Works v. Rea*, 19 S. W. 1063 (Ark.). As in the case at bar, the contract was entire. Upon the ground that the vendee was in default in payment, the vendor sought to exercise his election to retake the property. The vendee claimed damages resulting from the vendor's failure to deliver the remainder of the apparatus and had tendered a sum greater than was necessary to cover the excess of the amount due the vendor over the damages suffered by the vendee from the incomplete delivery. The court held that the rights of the parties should be adjusted on that basis, and that the title to the apparatus delivered should pass to the vendee upon condition that the tender was made good. The syllabus reads:

In replevin for machinery by the seller thereof on a contract providing for title remaining in him until full payment of purchase money, defendant may, by way of defense, plead damages for nondelivery of part of the machinery sold, and an offer to pay the balance of the purchase money in excess of the damages which may be ascertained. (Syl. 1)

The title to part of the property contracted for under conditional sale was thus conferred upon the vendee. Since the latter had not been guilty of a breach, the vendor's right of election did not accrue. If, as in the case at bar, the vendee had broken the

contract, the vendor would, of course, have had his election. The decision is thus direct authority in the case at bar.

Among the decisions where the courts have applied the same idea of the severability of the subject matter of a conditional sale, although the contract is entire, is *Richardson v. Teasdall*, 72 N. W. 1028 (Neb.). There a stock of drugs had been sold, subject to reservation of title, for the sum of \$2,000. On the vendee's breach after part payment the vendor was permitted to recover that part of the stock which still remained in the possession of the vendee.

Again in *O'Rourke v. Hadcock*, 22 N. E. 33 (N. Y.), several chattels had been sold under conditional sale. Upon the vendee's failure to pay the vendor seized the property for the purpose of selling it and collecting the amount due. But it was held that he had no right to seize and sell more than was sufficient to satisfy his demand.

Lest any question arise because of the language of Section 3311 of the Civil Code prescribing the measure of damages where the buyer refuses to pay for personal property to which title has not passed, it is well to point out that this rule does not apply where the property has been delivered under a conditional sale. The decisions of the California Supreme Court cited in the opening brief are conclusive upon this question. It is also noteworthy that this view has been specifically applied to Sec-

tion 1899 of the Revised Codes of North Dakota, which is precisely the same as the California codification (See *Dowagiac Mfg. Co. v. Mahon*, 101 N W. 903).

However, to return to the defendant's contention that plaintiff's action concerning the second and third generators constituted an election, it is noteworthy that defendant's argument is opposed to a fundamental rule concerning election of remedies. There is no suggestion that plaintiff's conduct created an estoppel. Therefore its acts did not constitute an election. The principle is clearly stated at 15 *Cyc.* 260-261, as follows:

Although acts prior to the actual commencement of legal proceedings indicate an intention to rely upon one remedial right, yet they do not constitute an election which will preclude the subsequent prosecution of an action based upon an inconsistent remedial right, unless the acts contain the elements of an estoppel *in pais*.

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## **7. All the Evidence Shows That Plaintiff Performed Its Obligation Under the Contract.**

Defendant asserts (brief p. 14) that evidence was introduced to support its contention that plaintiff's generator was deficient. But defendant does not point to anything in the record to justify this statement.

There was no conflict upon the subject of the bedplate. Defendant admits it was not provided

for in the contract. That is conclusive; the plaintiff was not required to furnish anything that was not contained in the agreement. But the contract specifically places the duty in this respect upon the defendant. It provided:

All apparatus included herein is to be delivered and erected *on foundations* in the basement of the Spalding Building, Portland, Oregon. (\*2)

\* \* \* \* \*

3. In case it is elsewhere herein agreed that the Company shall erect the apparatus herein specified, it is with the distinct understanding that the Company is to furnish the said apparatus and the labor of the erection only, the *Purchaser furnishing all foundations* and masonry work, including grouting, supports, builders' or joiners' work, access to premises, excavation and making good again. It is also understood that the material and workmanship of such foundations, supports, etc., shall be first-class and adequate for the purpose intended. (\*17)

The testimony of Mr. Hunt was merely cumulative. Its purpose was to aid the jury to understand the meaning of the contract. The suggestion of defendant that proof must be adduced to show that it had knowledge of the subject matter of Mr. Hunt's testimony is startling. If defendant did not know what a generator was, that was its loss.

Defendant asserts that whether it was guilty of a breach of the contract in failing to pay \$1500 on July 15, 1910, was a question for the jury. Here again defendant is in error. The question was one



of law. The legal consequences of defendant's default was to excuse plaintiff from proceeding further with the contract so long as the installment remained unpaid. The authorities cited in the opening brief are conclusive on this point.

Defendant's suggestion that plaintiff did not treat the failure to pay as a breach is based upon an apparent misconception of the legal effect of the default. The opening brief (pp. 33-5) clearly states our position. We contend that while the defendant persisted in its refusal to pay, we were under no duty to hazard further loss, and therefore, in view of defendant's continued default it became immaterial whether or not our subsequent performance was within time. Defendant's argument is addressed to the case of a breach upon which the party aggrieved may consider the contract "at an end", in so far as performance is concerned (brief p. 15). This, of course, is an entirely different matter. The distinction is pointed out in the opening brief at page 35.

The suggestion that the payment of \$1500 was in no event due until installation and acceptance of the first generator is opposed to the terms of the contract. It was contemplated that the generator would be in operation on July 1 (\*34) but the plaintiff protected itself against delays in installation by providing that the partial payment "will not be made later than July 15, 1910." This date and not the erection of the generator is controlling. Moreover, the defendant's statement that the first

generator "never was accepted" loses sight of the principle of law above discussed that acceptance is unnecessary where due performance is rendered.

Defendant's effort to disclaim its repudiation of the contract is surprising. Whether its abandonment was justified is one matter, but surely there can be no doubt concerning the tenor and legal effect of its letter of August 25. The refusal to accept plaintiff's performance might admit of some question. But the notice, couched in legal terms, that "inasmuch as you have violated your contract with us, the same is void and of no effect" has but one meaning. It entitled the plaintiff to desist from further performance. The plaintiff was not required to weigh other statements of milder tenor to determine whether the positive notice of repudiation meant what it said. This is what defendant asks this Court to do. When legal rights hang in the balance, one party cannot use strong language of well defined legal import merely to note its effect upon the other. The plaintiff is entitled to take the defendant at its word. However, the further language of the letter upon which defendant relies is entirely consistent with its renunciation of the contract. Plaintiff is told to "rectify its broken promises". The law provides the method by which one who "violates his agreement" must make good—in damages.

Defendant criticizes our statement that the ninety-day period began on June 1. "Receipt of the order" was the starting point and defendant

says that Wernicke received it on May 26. But the contract provides for delivery “from our *factory* in approximately 90 days from date of receipt of order with full and complete information.”

Plaintiff’s factory where the generator and switchboard were to be constructed in accordance with the specifications were at East Pittsburgh. The receipt of the order there started the time running. This is a matter of construction of the contract which rests with the court and, not as defendant says, a fact in dispute for the jury to decide. This Court takes judicial notice of the time required to take the contract to Portland and thence have it delivered by mail at Pittsburgh. Hence, the computation of the ninety-day period in the opening brief.

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## 8. The Hearsay Testimony.

A word in conclusion concerning the defendant’s effort to justify the ruling of the trial court permitting Head to testify what Colonel Spalding had said to him in the absence of any representative of the plaintiff. Colonel Spalding’s statements were, of course, purely narrative. There was no element of spontaneity; it did not approach the dignity of a verbal act.

Defendant contends for its admissibility first upon the ground that the cross-complaint alleges that its contract with the plaintiff was intended to be a part of its contract with Spalding. But

plainly, this attempt in the pleading to vary the terms of a written agreement would not make evidence on the subject admissible. Otherwise, in order to lay the foundation for the introduction of incompetent testimony, it would only be necessary to allege it in a pleading.

Defendant's next ground is that Wernicke's testimony opened the door for the admission of the hearsay. As defendant states, Wernicke testified concerning his conversation with Head. This, without doubt, permitted the defendant to produce its version of the Wernicke-Head conversation, but not to quote the statements of a third party.

Defendant next would have it appear that Head's quotation of Spalding's remarks was a part of Head's narrative of his conversation with Wernicke. But the record does not bear this out. Head was distinctly asked to tell what passed between himself and Colonel Spalding. Over our objection he related the conversation as an independent matter of evidence (\*171-2). He testified that thereafter he "told Wernicke about it." But there was no pretense that the testimony under objection was a narrative of Head's interview with Wernicke, and no endeavor to cure the error which had already been committed.

Finally, it is contended that the hearsay was properly admitted to contradict Winn's statement of the reason why the defendant was directed to remove its apparatus from the Spalding Building.

It is, of course, fundamental that the statement of another person not in the presence of a witness can not be used to impeach the witness. Moreover, Winn was superintendent of Colonel Spalding's buildings, and stated his knowledge of the subject. If the defendant desired to contradict him with Spalding's own views, it should have produced the Colonel himself. In fact, Spalding's own testimony showing why he ordered the defendant to stop work was the only competent means by which defendant could seek legally to prove the assertions upon which it relied.

It is respectfully submitted that the judgment should be reversed.

Dated, San Francisco,

May 3, 1916.

DAVID L. LEVY,

WALTER SHELTON,

CAMPBELL, WEAVER, SHELTON & LEVY,

*Attorneys for Plaintiff in Error.*



No. 2674

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

WESTINGHOUSE ELECTRIC & MANUFACTURING  
Co. (a corporation),

*Plaintiff in Error,*

VS.

SAMSON IRON WORKS (a corporation),

*Defendant in Error.*

## PETITION OF PLAINTIFF IN ERROR FOR A REHEARING.

CAMPBELL, WEAVER, SHELTON & LEVY,  
Mills Building, San Francisco,

*Attorneys for Plaintiff in Error  
and Petitioner.*

*Filed this*.....*day of July, 1916.*

*F. D. Monckton,*

*FRANK D. MONCKTON, Clerk.*

*By*.....*Deputy Clerk.*



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## PETITION OF PLAINTIFF IN ERROR FOR A REHEARING.

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*To the Honorable William B. Gilbert, Presiding  
Judge, and the Associate Judges of the United  
States Circuit Court of Appeals for the Ninth  
Circuit:*

### I.

Plaintiff asks particularly for the further consideration of one question decided here which is of utmost importance to the manufacturers and purchasers of all classes of mechanical and electrical apparatus. Transactions involving such property are now invariably conducted on the basis of conditional sale. This form of bargain has been fostered by the courts, particularly in the western

states. (*Liver v. Mills*, 155 Cal. 459). It has been recognized to the fullest extent by the Supreme Court of the United States. (*Detroit Steel Co. v. Sistersville Co.*, 233 U. S. 712). The extremely speculative character of the undertakings in which such machinery is used has made it necessary and proper that manufacturers protect themselves by reservation of title against inability of the purchaser to pay the price. In assuring to the seller the benefits of this stipulation, no court has ever converted it into a burden. That is precisely what the decision here has accomplished.

The effect of this decision will not be confined to an adjustment of the rights of the parties arising out of the controversy before the Court. It will be more far-reaching than that. It will be a disturbing factor in the law of sales.

The law is well settled that the sole difference between an absolute and a conditional sale lies in the reservation of title. In other respects the same rights and obligations are created by both; the same remedies accrue. But the decision here makes an unexpressed and, we believe, an unintended distinction between the two, thereby injecting into settled practice an element of confusion which, it is respectfully submitted, the Court should be quick to dissipate.

This case is concerned with the rights of a conditional vendor where after partial delivery the purchaser repudiates the contract. This Court has de-

cided that by reason of the sale to other parties of the undelivered apparatus, the seller was "no longer in condition to waive its title to the property, or to transfer the title to the defendant. It had elected to retain the title."

Bearing in mind that the plaintiff here sued on the theory that it waived its title to the generator delivered and installed, the meaning of the decision is that the sale of the remainder operated as an election to retain title to all the apparatus under the contract.

The word "election" means a choice between different courses of action. Therefore, in order that plaintiff's conduct may be termed an election, there must necessarily have been some alternative open to plaintiff. If plaintiff was compelled to sell the second and third generators, that act was not an election. The law of California and of the western states, the law administered by the Federal Courts, the law of every jurisdiction, except New York, in fixing the vendor's measure of damages, deducts the market value of the undelivered property—in other words, the amount which a sale thereof in the open market will yield. The vendor is, therefore, forced to sell what is on hand so as to mitigate damages. Because it did with the second and third generators what the law compelled it to do, shall the plaintiff be said to have prejudiced its rights in respect to the generator which it had delivered and installed? In so deciding, this Court has in effect held that plaintiff had no election at all.



These questions are fully and carefully considered in sections 4 and 6 of the reply brief on file. (Pages 13-34). The authorities are there collected. It is shown that as to the articles undelivered the reservation of title had not become operative and, therefore, in this respect, was not susceptible of waiver. It is shown that there was no necessary relation between the status of the first generator and the other two. Hence, plaintiff's conduct with respect to the undelivered apparatus could not affect its rights to recover for that which had been installed. That the contract provided a single total price for all the apparatus is material only to the assessment of the plaintiff's damages. The suit for the whole or part of the purchase price—the act which accomplishes a waiver of title of the delivered property—is always an action on the contract. The reply brief even contains the citation of an authority where under an entire contract of conditional sale the court refused to permit the seller to retake for default in payment that part of the apparatus which had been delivered to the purchaser. The basis of this decision was the existence of a counterclaim in favor of the purchaser arising out of the seller's failure to deliver the remainder.

Surely, these arguments and the authorities supporting them are worthy of some consideration at the hands of this Court. But they are not mentioned. For all that appears in the opinion, the reply brief may not have been written. The question is one of great moment to the plaintiff and thousands

of others doing business upon the same basis of bargain. The amount involved in this suit is not large. As it often happens, plaintiff has in mind here not so much the settlement of the particular dispute as the determination of a legal problem in such a manner that a precedent for the courts and thus a definite guide for future conduct in business will be had. If the reasoning and authorities presented in the reply brief do not control the issue at bar, it is of the highest importance that the decision here point out wherein they can be distinguished. As the opinion now stands, there is no certainty that these arguments were brought to the Court's attention; the fact that they are fully presented in the brief will certainly not suffice to show that they were in the Court's mind. Thus, the question will remain to be decided in future litigation and in the meantime the subject matter will be embraced in doubt and uncertainty.

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## II.

It is pertinent here to point out other features in which the plaintiff's case merits further consideration. In the opinion it is said:

Nor do we find that the instructions so given by the court are subject to the objection that the jury were thereby precluded from awarding plaintiff damages for the expense of installation and removal of the first generator.

Plaintiff made no such objection. On the contrary, the fact that the trial court *did* instruct the

jury that such was the measure of plaintiff's damage was relied on as error. Plaintiff had offered no evidence upon this theory. In the briefs it complained that the trial judge had restricted its recovery to these particulars and had prohibited any verdict on account of the price or value of the first generator.

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### III.

Finally, there is a count in the complaint in *indebitatus assumpsit* for the reasonable value of the first generator. The opinion holds:

To sue in *indebitatus assumpsit* is not to sue for the purchase price. *Barrere vs. Soms*, 113 Cal. 97.

The court thus decides inferentially that where there has been partial delivery and a repudiation by the vendee, the common count will not lie. The reply brief (section 5) points out that the case cited does not concern this question at all. Authority is there presented which clearly announces the principle that recovery may be had in general *assumpsit* for the reasonable value of partial performance under a contract of unconditional sale.

The opinion of the Court suggests no reason why the same rule should not obtain in the case of a conditional sale. On the contrary, the reply brief cites two cases in which the conditional vendor is said to be entitled to sue either for the price or value of the

article. Here, again, is a distinction made by the Court between conditional and absolute sales for which no reason appears and no authority can be found.

It is therefore, respectfully submitted that a rehearing should be granted.

Dated, San Francisco,  
July 26, 1916.

CAMPBELL, WEAVER, SHELTON & LEVY,  
*Attorneys for Plaintiff in Error  
and Petitioner.*

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#### CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for plaintiff in error and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition is not interposed for delay.

DAVID L. LEVY,  
*Of Counsel for Plaintiff in Error  
and Petitioner.*













